

1 IN THE UNITED STATES BANKRUPTCY COURT

2 SOUTHERN DISTRICT OF TEXAS

3 HOUSTON DIVISION

4 IN RE: § CASE NO. 05-91470-H1-7  
5 § HOUSTON, TEXAS  
6 GEORGE R. COUNCILL and §  
JANET COUNCILL, § THURSDAY,  
7 DEBTORS. § OCTOBER 7, 2010  
§ 2:02 P.M. TO 4:57 P.M.

8 APPLICATION TO COMPROMISE

9 BEFORE THE HONORABLE MARVIN ISGUR  
10 UNITED STATES BANKRUPTCY JUDGE

11 APPEARANCES:

12 FOR DEBTOR: SEE NEXT PAGE  
13 COURT RECORDER: BRENT LASWELL  
14 COURT CLERK: MS. TEZENO  
15

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INDEXWITNESS:                      Direct                      Cross                      Redirect                      Recross

WILLIAM WEST, TRUSTEE

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EXHIBITS:    Marked                      Offered                      Received

Debtor's Exhibits

Numbers 1 through 4    7                      7                      8

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Trustee's Exhibits

Numbers 1 through 11    7                      7                      8

1        HOUSTON, TEXAS; FRIDAY, FEBRUARY 16, 2007; 8:42 A.M.

2                **THE COURT:** All right, we have the George and  
3 Janet Councill case. It's 05-91470. We'll take appearances  
4 here in court. I don't think we have anyone on the  
5 telephone.

6                **MR. SPARACINO:** Good afternoon, Your Honor, John  
7 Sparacino for Amway Corporation.

8                **MR. COWGILL:** Good afternoon, Your Honor, Craig  
9 Cowgill. I've been associated with Brock Akers.

10                David Jones is here on behalf of the moving  
11 parties, but my understanding is that he is in court with  
12 Judge Bohm and if you will excuse me, I will run up and see  
13 where he is or what the status is.

14                **MR. SPARACINO:** Yes, Your Honor, I believe at 1:30  
15 with Judge Bohm and didn't believe it was going to take very  
16 long.

17                **THE COURT:** All right. Yes, sir.

18                **MR. BECK:** Christopher Beck here on behalf of the  
19 Debtor, Your Honor.

20                **THE COURT:** All right. Any other appearances?

21                **MR. AKERS:** I'm Brock Akers.

22                **THE COURT:** Do you want me to wait for Mr. Jones  
23 or do you-all want to proceed without him?

24                **MR. COWGILL:** Let me run up and see --

25                **MR. BECK:** We've got no problem with that, Judge.

1           **MR. COWGILL:** -- where he is. I think we'd like  
2 to wait for him.

3           **MR. BECK:** Yes.

4           **MR. COWGILL:** But I need to go -- it would  
5 probably be better for me to go check and see where he is.

6           **MR. SPARACINO:** Yes, Your Honor. He is counsel  
7 for the Movant, so I would prefer we wait.

8           **THE COURT:** Why don't you-all just hold on a  
9 second. You-all can sit down.

10          **MR. BECK:** Thank you, Judge.

11          **MR. COWGILL:** He's calling?

12          **MR. SPARACINO:** Judge is calling.

13          **(Pause.)**

14          **THE COURT:** Judge Bohm's law clerk reports that  
15 he's making his ruling now, so I don't see much reason to go  
16 retrieve him when I assume that Mr. Jones will be here as  
17 soon as Judge Bohm finishes the ruling and we'll recommence  
18 the hearing at that point.

19                 This is the last hearing I have set for  
20 today. I do have to be somewhere tonight at 6:00. I'm not  
21 sure how long we'll be, but I suspect that that will be  
22 plenty of time to get it done, even if we have to wait for  
23 him. So I'll just return as soon as he gets here if you  
24 will let Ms. Tezeno know and we'll start at that point.

25                 Thank you.

1           **THE CLERK:** All rise.

2           **(Recess taken from 2:05 p.m. to 2:34 p.m.)**

3           **THE COURT:** Mr. Jones, did you want to make your  
4 appearance, please?

5           **MR. JONES:** Yes Judge, good afternoon. David  
6 Jones, J-o-n-e-s, on behalf of William West, the Chapter 7  
7 Trustee in the case. And again, Judge, I apologize for  
8 getting stuck in Judge Bohm's court.

9           **THE COURT:** It took me longer to get out than  
10 expected because I had to stay on the phone with Judge Bohm  
11 apologizing that he kept you. So I think it's okay.

12           **MR. BECK:** Christopher Beck, B-e-c-k, on behalf of  
13 the Debtor.

14           **THE COURT:** Thank you, Mr. Beck.

15                   All right. What kind of evidence are we  
16 going to have today in the way of documentary evidence?

17           **MR. JONES:** Judge, the Trustee had eleven  
18 exhibits. They should have been delivered to chambers.  
19 Counsel has a copy delivered yesterday as well.

20           **THE COURT:** Mr. Beck, which of those do you have  
21 objections to?

22           **MR. BECK:** Judge, I've reviewed the exhibits that  
23 he's provided. I actually don't have objections to any of  
24 the exhibits that he's got.

25                   We've provided them with five exhibits that

1 we have. I've got a copy for the court here, I didn't have  
2 those --

3 **THE COURT:** All right, let me see yours. Thank  
4 you.

5 Mr. Jones, which of his five exhibits do you  
6 have objections to?

7 **MR. JONES:** Judge, Exhibit Number 5 and it's  
8 simply because I don't understand what it is.

9 **THE COURT:** All right. Mr. Sparacino, which  
10 objections do you have to any, either side's exhibits?

11 **MR. SPARACINO:** Your Honor, I have no objection to  
12 any of Mr. Jones' exhibits.

13 **THE COURT:** Okay.

14 **MR. BECK:** May I approach the bench?

15 **THE COURT:** Yes, sir.

16 **MR. SPARACINO:** I have no independent objection to  
17 any of Mr. Beck's exhibits. I also have exhibits that I've  
18 filed, the Witness and Exhibit List -- the Amended Witness  
19 and Exhibit List.

20 Frankly, Your Honor, I believe I'm going to  
21 use those only in cross-examination and I don't think I'm  
22 going to move to admit any of exhibits in my exhibit book.

23 **THE COURT:** All right. I'm going to admit the  
24 Trustee's 1 to 5. I'm going to admit Mr. Beck's 1 to 4.  
25 I'll let him offer Number 5 during the course of the hearing

1 and tell me what it's about. Then we'll listen to  
2 Mr. Jones' objection at that point.

3 So 1 to 4 admitted by Mr. Council; 1 to 11  
4 by the Trustee.

5 **(Debtor's Exhibits Numbers 1 through 4 and Trustee's**  
6 **Exhibits Numbers 1 through 11 received in evidence.)**

7 **THE COURT:** I have a question before we begin.  
8 The proposed form of Order by the Trustee has a provision in  
9 paragraph 7 that settles any claims that have been or could  
10 be asserted by the Debtors, as opposed, in addition to  
11 another laundry list of folks.

12 Having read Mr. Council's objection, I'm  
13 trying to figure out to the extent that there are post-  
14 petition claims that are owned -- because they arose post-  
15 petition, owned by the Council's, is the Trustee attempting  
16 to Order that those are released as well or only that the  
17 Debtor's pre-petition rights are being released because they  
18 emerged into the estate?

19 **MR. JONES:** That's exactly right, Your Honor. If  
20 there is a claim, and so nobody is taken aback by this, we  
21 don't believe there can be.

22 **THE COURT:** I understand that.

23 **MR. JONES:** But no, we are not trying to resolve  
24 any post-petition claim that might be owned by the Debtor or  
25 quite frankly anybody else.



1           **THE COURT:** So, if Mr. Councill, just so that  
2 we -- I want to beat this a little bit to death because I  
3 want to be sure that at least part of the dispute raised by  
4 Mr. Beck is resolved right up front, which is that this  
5 Order will not say that Mr. Councill's post-petition claims,  
6 if they exist, and I'm not saying they do, are being  
7 released, even if we approve this, only his pre-petition  
8 claims that became part of the estate.

9           **MR. JONES:** Judge, I don't have the ability to do  
10 that. And I'm not trying to do that.

11           **THE COURT:** Okay. And so to the extent this  
12 language might be read that way, you're agreeing we have to  
13 fix the language?

14           **MR. JONES:** I don't -- well, in the context --

15           **THE COURT:** I think it --

16           **MR. JONES:** -- I don't see how you can read it  
17 that way, but no we are not trying to settle any post-  
18 petition claims owned by the post-petition Debtor.

19           **THE COURT:** And do you agree that your settlement  
20 with the Trustee, if it's approved, does not include a  
21 release of claims by Mr. Councill that arose after the day  
22 of the petition?

23           **MR. SPARACINO:** I'm going to give you a long-  
24 winded answer to that.

25           **THE COURT:** I suspect. Because I think it's a

1 hard question. I just want to be sure we define it right.

2 **MR. SPARACINO:** Understand. This was a three-day  
3 mediation, a heavily negotiated Settlement Agreement, a  
4 heavily negotiated form of Order, among a number of  
5 Defendants and their carriers, including my client Amway --  
6 highly negotiated. The parties believed that one of the  
7 claims that was among the claims being resolved was this  
8 assertion by Mr. Councilll that he's entitled to bonuses  
9 post-petition.

10 The parties believed that those claims were  
11 property of the bankruptcy estate and as such, those claims  
12 were among the claims that the Trustee owned, had control of  
13 and could settle and resolve and is settling and resolving  
14 today. It's frankly -- as I stand here today, it's  
15 unacceptable to my client to water that protection down and  
16 to leave my client with the prospect that tomorrow it's  
17 going to face a lawsuit filed by Mr. Councilll to recover  
18 post-petition bonus amounts.

19 So to the extent the Councilll's believe that  
20 they have this right, that this claim is not an estate  
21 claim --

22 **THE COURT:** Let me tell you what I'm contemplating  
23 doing and I'll hear -- this is assuming we approve it and we  
24 haven't even gotten to that state. But I don't want to  
25 start off the hearing not even knowing -- I want everybody

1 to know the maximum that I'm willing to do if the evidence  
2 approves it, is to cross-out the word "Debtors" from  
3 Paragraph 7, but to include a new paragraph X that says,  
4 "All persons, including the Debtors, are enjoined from  
5 prosecuting any claims of the estate that have been  
6 released," which would then bar them from bringing that  
7 claim if the Trustee owns it. But it wouldn't stop them  
8 from bringing their own claims.

9 In all likelihood that means at some point,  
10 we going to have to figure out, if they want to pursue this  
11 and if we approve this, who owns that claim. And maybe  
12 today is the day to decide who owns that claim. But that  
13 may come on down the road.

14 When -- if Mr. Councill decides to prosecute  
15 a claim against Amway, if this approved or you can call  
16 Amway, whatever the settling --

17 **MR. JONES:** We call them the "Amway Entities."

18 **THE COURT:** -- the "Settling Defendant."

19 **MR. SPARACINO:** And believe me Your Honor, there  
20 not all Amway, there is discord among the ranks of  
21 Defendants, as well.

22 **THE COURT:** I think that the particular claim of  
23 post-petition distributions --

24 **MR. SPARACINO:** That's correct.

25 **THE COURT:** -- if he decides to bring that, we'll

1 have to decide either today or at a future date whether that  
2 would be encompassed within the injunctive relief.

3 But what I don't want is to later decide that  
4 this Order said Debtors and therefore, it included anything  
5 that he might own post-petition. I don't think that's fair.  
6 But to say, I mean they can't bring claims that belong to  
7 the estate. That would be an estate violation by them.  
8 They can't bring it if we were to release them. That would  
9 violate our Order, because I'm going to enjoin it.

10 But they may own them and either today or in  
11 the future when they decide to bring them, we're going to  
12 have to resolve that. And I want to figure out if that at  
13 least resolves that objection and if that -- assuming that  
14 does resolve that objection, if Amway would proceed with the  
15 deal with that, because I am not going to release, force  
16 them to release something that they own that the estate  
17 doesn't own.

18 **MR. BECK:** Yes, Your Honor. And by response, Your  
19 Honor, I think you've hit upon what was probably the third  
20 pillar of our objection and that is that, if you recall, the  
21 underlying bankruptcy case at the beginning it was an  
22 advisory proceeding filed because my client received a 1099  
23 for payments that were supposedly paid to him after the  
24 filing of the petition by Amway, from the Amway Defendants.

25 The 1099 came from a Defendant saying that

1 this was paid to you and you now have to pay taxes on it.  
2 However, the money was held up in offset against the  
3 judgment, which, of course, is no longer in existence.

4 So because the payments became due and  
5 payable on a monthly basis post-petition was our basis of  
6 our claim there that these are improper set-offs that belong  
7 to the Debtors. And so that is our contention on that  
8 pillar of our objection.

9 **THE COURT:** Right, but I think, and I don't want  
10 anybody mislead by this because I have not reached a  
11 conclusion.

12 **MR. BECK:** Understood.

13 **THE COURT:** I think there is a good faith argument  
14 at a minimum.

15 **MR. BECK:** And that's what we're asking with our  
16 objection here, is that we still be allowed to bring that in  
17 the future if they decide to.

18 **THE COURT:** I think there is a good faith argument  
19 that the post-petition royalties, if earned from  
20 pre-petition work, became property of the estate when the  
21 petition was filed and therefore are the Trustees to settle.  
22 I'm not planning to reach that conclusion today, but it's  
23 certainly a non-frivolous argument by the Trustee and by the  
24 settling Defendants that your client doesn't own that even  
25 if he got 1099.

1                   Now if the issuance of the 1099 itself  
2     created damage, you know, best guess is he does own that,  
3     but that's different than saying he necessarily owns the  
4     royalties themselves. And all I'm telling you is, I'll  
5     probably preserve that today and I want to know if it  
6     resolves that part of the dispute.

7                   **MR. BECK:** It does, Judge, I'm not asking you to  
8     make a decision on whether or not they have a claim, just  
9     that if they have one, they are free to bring it.

10                  **THE COURT:** And would Amway still settle if I do  
11     that? Because I'm telling that's pretty much the most I'm  
12     going to do and the language can be worked on, but --

13                  **MR. SPARACINO:** I understand, Your Honor. I  
14     unfortunately don't have authority today to say that Amway  
15     would agree to any changes to the form of the Order, number  
16     one. And number two again, I'd note, that there are other  
17     Defendants, including carriers, involved, as well, that  
18     might have to weigh in on that issue, so --

19                  **THE COURT:** As their lawyer, what's your objection  
20     to that provision in terms of being in conformance with the  
21     law?

22                  **MR. SPARACINO:** I understand that that is a  
23     statement, a correct statement of the law.

24                  **THE COURT:** Okay, so I'd have to do that and if we  
25     approve it, that change will be here; therefore, I really

1 don't need to hear evidence or argument on that unless the  
2 parties agree they want to resolve today, who owns that  
3 claim, which I doubt people are completely prepared to do.

4 **MR. BECK:** We weren't prepared to do that directly  
5 today.

6 **THE COURT:** So I'm inclined just to preserve it  
7 for a future revision and allow you -- probably when we  
8 craft the injunction language to allow you to come in for a  
9 declaration.

10 **MR. SPARACINO:** Your Honor, I'll note that I was  
11 certainly prepared today through cross-examination to point  
12 out where Mr. Councilll has admitted a number of times under  
13 oath that he provided no services post-bankruptcy. And so  
14 the 541(a)(6) exception would not be applicable here.

15 **THE COURT:** Yeah, but let's assume that you sent  
16 him a 1099 and that he had to pay taxes based on the 1099  
17 that you sent him.

18 **MR. SPARACINO:** Well, the 1099 was withdrawn.

19 **THE COURT:** Yeah, but I don't know what happens  
20 between, I just don't know what happens between the date you  
21 sent it and the date he gets it, but seems like if you sent  
22 him a 1099 that you shouldn't sent him and you didn't send a  
23 1099 to the estate but you sent it to him, there might be an  
24 issue there. And if there is, I don't think I can resolve  
25 it without his consent.

1                   Okay, well then I'm basically telling you-all  
2 how I'm going to resolve that one, to try and streamline the  
3 hearing. That assumes I'm going to approve everything and I  
4 know that we're a long way from doing that, but I don't want  
5 to waste a lot of time at the hearing on issues that we  
6 don't need to spend.

7                   So who is going to be your first witness,  
8 Mr. Jones?

9                   **MR. JONES:** The Trustee.

10                  **THE COURT:** Mr. West, will you come forward  
11 please? Mr. West, would you raise your right hand, sir?

12                  **(Witness sworn.)**

13                  **THE COURT:** Mr. Jones, give me a minute to get my  
14 computer arranged.

15                  All right.

16                  **MR. JONES:** May I proceed, Judge?

17                  **THE COURT:** Yes, sir.

18                  **DIRECT EXAMINATION OF WILLIAM WEST**

19 **BY MR. JONES:**

20 Q       Mr. West, will you state your name for the record,  
21 please?

22 A       William George West, Jr.

23 Q       And what is your relationship to this bankruptcy case?

24 A       I'm the Chapter 7 Bankruptcy Trustee.

25 Q       Now, Mr. West, you are today seeking a settlement of



1 all of the estate's claims against what I am going to call  
2 the "Amway Entities" and we'll identify those in a second.  
3 But is that a fair statement?

4 A Yes.

5 Q All right. Could you tell the Judge just briefly the  
6 context under which this settlement was reached?

7 A There was a three-day mediation in May, which led to  
8 this settlement.

9 Q Correct. Did you personally attend that mediation?

10 A Yes.

11 Q Did you participate in the negotiations back and forth?

12 A Yes.

13 Q Were you there both with your special litigation  
14 counsel as well as you bankruptcy counsel?

15 A Yes.

16 Q All right. Now, Mr. West, I'd like for you to turn to  
17 Exhibit 7.

18 A Yes.

19 Q This has been admitted. Is this a copy of the  
20 Settlement Agreement that was derived out of the mediation?

21 A Yes.

22 Q All right. Now I want to go through this very briefly.

23 **MR. JONES:** Judge, I'm mindful of what you said  
24 about the -- about the claim issue.

25 **BY MR. JONES:**

1 Q But just very briefly the list of Plaintiffs, those are  
2 the parties that are providing the releases, correct?

3 A Yes.

4 Q And Mr. Council is not one of those parties; is that  
5 correct?

6 A Correct.

7 Q All right. Now, Mr. West, you're actually in there as  
8 the Chapter 7 Trustee for two different cases, correct?

9 A Yes.

10 Q And the other case is the Kitia (phonetic) case.

11 A Yes.

12 Q And that settlement has been approved?

13 A Yes.

14 Q All right. With that Mr. West, just briefly, let's  
15 turn over to page 4 of the settlement. Under paragraph 6,  
16 if you just read along with me, it says:

17 "This Settlement Agreement is subject to review and  
18 approval" by each bankruptcy -- I'm sorry, "by each  
19 United States Bankruptcy Court having jurisdiction over  
20 each Trustee Plaintiff's bankruptcy case."

21 Did I read that correctly?

22 A Yes.

23 Q All right. How many cases are pending in which a  
24 Motion to Compromise was filed?

25 A Thirteen.

1 Q All right. And to date, how many have been approved?

2 A Eight.

3 Q Have any been denied?

4 A Not to my knowledge.

5 Q Now, Mr. West, if you turn back to page one of

6 Exhibit 7? Are you there?

7 A Yes.

8 Q All right. And down under "Defendants," there are a

9 list of parties. Do you see that?

10 A Yes.

11 Q Under the term "Defendants"?

12 A Yes.

13 Q And those are the Amway parties to whom you are

14 receiving compensation and you are granting a release; is

15 that correct?

16 A Yes.

17 Q All right. Now, Mr. West, if you would turn over to

18 page three of ten of Exhibit 7?

19 A Yes.

20 Q Under paragraph five, there is a chart that sets forth

21 whose going to get what, correct?

22 A Yes.

23 Q All right. And under the proposed settlement how much

24 is the Council bankruptcy estate going to receive?

25 A \$426,410.69.

1 Q All right. Now, Mr. West, if you could very briefly  
2 for the Judge, explain the process by which you evaluated  
3 this number and how this number was arrived at.

4 A Before the mediation, the Trustees had gotten together  
5 and had asked special counsel to provide a listing or a  
6 weighting of what he believed the values of the cases to be.

7 Q Correct. And did you use that weighting in order to  
8 establish the relative priority of one claim against another  
9 between the various Trustees?

10 A Yes.

11 Q All right. And so, when a particular offer was made  
12 did you then take that weight and figure out how much your  
13 separate estate would get?

14 A Yes.

15 Q All right. Then what did you do with that number? Did  
16 you have further conversations?

17 A Yes.

18 Q Did you have those with Mr. Akers, or did you have  
19 those with your bankruptcy counsel?

20 A Both.

21 Q And what did you attempt to do with that number?

22 A To compare it to the claims made in the case.

23 Q All right. Now, Mr. West, I'd like for you to turn to  
24 Exhibit 1. This has been admitted.

25 A Yes.

1 Q This is a pleading filed by Amway Corporation and  
2 Quixtar in advisory proceeding 06-3501 before this Court,  
3 correct?

4 A Yes.

5 Q All right. Now, if, first of all, let me ask why did  
6 you pick this document?

7 A Because of the -- this particular document had good  
8 clear copies in the exhibits.

9 Q Okay. All right. So let's look at Exhibit A to  
10 Exhibit 1.

11 A All right.

12 Q Up at the top it says, "Amway Distributor Application  
13 (Authorization and Contract)"?

14 A Yes.

15 Q All right. Is -- and can we agree that this is the  
16 "Amway Agreement," if you will?

17 A Yes.

18 Q Now if you look about two-thirds or three-quarters down  
19 the page, when was this document executed?

20 A April 9, 1989.

21 Q Okay. By both Debtors?

22 A Correct.

23 Q All right. Now let's look over at Exhibit C to  
24 Exhibit 1. And is this what you refer to as the "Quixtar  
25 Agreement"?

1 A Yes.

2 Q What is the date of this agreement?

3 A October 27, 1999.

4 Q And if you would turn over to Exhibit D of Exhibit 1,  
5 is this the "Quixtar Biz Reference Guide"?

6 A Yes.

7 Q Is this the document that sets forth all the rules and  
8 regulations regarding the Quixtar business?

9 A That's my understanding.

10 Q All right. Now, Mr. West, you've had copies of these  
11 three documents since early on in your administration of the  
12 case, correct?

13 A Yes.

14 Q All right. And have you based your -- number one have  
15 you read these documents?

16 A Yes.

17 Q All right. Have you had the chance to review the  
18 documents with Counsel?

19 A Yes.

20 Q And Mr. West, have you made your decision in this case  
21 based in part upon your determination that these are the  
22 operative documents?

23 A Yes.

24 Q Now, Mr. West, when was the bankruptcy case filed?

25 A October 14, 2005.

1 Q Do you remember what day October 14, 2005 was?

2 A It was a Friday.

3 Q Are you able to do that for any date or what? What was  
4 special about that day?

5 A It was the Friday before the law changed on the  
6 following Monday.

7 Q Gotcha. So both the Quixtar Agreement and the Amway  
8 Agreement are all pre-petition agreements, correct?

9 A Correct.

10 Q Now, Mr. West, let's look at Trustee Exhibit 2.

11 A Yes.

12 Q That's a copy of the petition that created this case,  
13 correct?

14 A Yes.

15 Q All right. And if you look at page two, signed under  
16 penalty of perjury by Mr. and Ms. Council, actually by  
17 Mr. Council and by Ms. Council with permission by Mr.  
18 Beck; is that correct?

19 A Correct.

20 Q All right. Now let's look at page one.

21 A All right.

22 Q About three-quarters of the way down, you see the box  
23 that says "statistical/administrative information estimates  
24 only"?

25 A Yes.

1 Q Would you read the box that is checked?

2 A "Debtor estimates that after any exempt properties  
3 excluded and administrative expenses paid, there will  
4 be no funds available for distribution to unsecured  
5 creditors."

6 Q All right. And if we go down two boxes to the  
7 "estimated asset box," would you read the value of the  
8 assets that the Debtor under penalty of perjury told this  
9 court and the world as to what his assets were worth?

10 A "\$50,001 to \$100,000."

11 Q Now, Mr. West, did you consider the Debtor's statement  
12 under penalty and perjury in making your decision to accept  
13 the settlement that you are asking the court to approve?

14 A Yes.

15 Q All right. Now, let's turn over to Trustee Exhibit 3.

16 A Yes.

17 Q These are the Bankruptcy Schedules, are they not?

18 A Yes.

19 Q Now, Mr. West, I want you to look at Schedule B and I  
20 want you to tell me where the Debtor listed an Amway  
21 contract, a Quixtar contract, anything sort of Amway-related  
22 agreement.

23 A I didn't see one listed.

24 Q All right. I want you to look at Exhibit -- I'm sorry,  
25 I want you to look at Schedule G, Executory Contracts.



1           **THE COURT:** Mr. West, what about Block 20 on  
2 Schedule G?

3           **MR. JONES:** Judge, I'm going to come back to that.  
4 It's not a contract.

5           **THE COURT:** The breach of contract claim --

6           **MR. JONES:** It's a claim.

7           **THE COURT:** -- I want a clear record on this and  
8 he lists the breach of contract claim and to say that he  
9 doesn't even describe an Amway contract claim --

10           **MR. JONES:** No, that's not what I asked him,  
11 Judge. I said a contract and there is a difference between  
12 a contract and a claim.

13           **THE COURT:** There maybe a difference, but what did  
14 you do with that, Mr. West? Did you notice Item 20?

15           **THE WITNESS:** Yes, sir.

16 **BY MR. JONES:**

17 Q Now, Mr. West, looking at Schedule G, Executory  
18 Contracts, is there any mention or reference by the Debtor  
19 to a Quixtar Agreement or an Amway agreement or any  
20 agreement related to Amway?

21 A No.

22 Q All right and Mr. West, did you consider those  
23 omissions in making your decision to go forward with the  
24 proposed settlement?

25 A Yes.

1 Q Now, the Judge just pointed you to question 20 and  
2 let's deal with that. Question 20: "There is a breach of  
3 contract claim and other causes of action against Amway and  
4 other Defendants in Case Number H-98-0352."

5 Did I read that correctly?

6 A Yes.

7 Q And the Debtor valued that claim \$6,710,619.00,  
8 correct?

9 A Yes, correct.

10 Q Now, Mr. West, does that statement conflict with the  
11 Debtors' statement on his petition?

12 A Yes.

13 Q And did you consider that fact in deciding whether or  
14 not to accept the settlement and go forward today?

15 A Yes.

16 Q All right. Now, Mr. West, the Debtor filed amended  
17 schedules in this case, correct?

18 A Yes.

19 Q Let's turn to Exhibit 5.

20 A All right.

21 Q These are the first amended schedules?

22 A Yes.

23 Q And except for the breach of contract claim at  
24 Question 20, is there any reference to the existence of a  
25 Quixtar Agreement or an Amway Agreement on the petition

1 date?

2 A No.

3 Q Now, in fact the changes to the amended schedules, if  
4 you'll turn to Question 12, is that the Debtor listed  
5 100,000 shares of Telegistics, correct?

6 A Yes.

7 Q All right. And that hadn't previously been disclosed,  
8 correct?

9 A Correct.

10 Q Have you received that stock?

11 A No.

12 Q Have you considered that fact in evaluating the  
13 credibility of the Debtor?

14 A Yes.

15 Q Now, Mr. West, there's also an accounts receivable  
16 listing that says, "Amway business monthly bonus that  
17 averaged about \$2100 a month, this has not been received in  
18 over a year, but the Debtor believes it is still owed with a  
19 value of zero."

20 Is that correct?

21 A Yes.

22 Q And this was property that the Debtor listed and stated  
23 existed as of the time of the bankruptcy, correct?

24 A Yes.

25 Q All right. Now, Mr. West, let's turn back to

1 Exhibit 4. That is the Debtor's Statement of Financial  
2 Affairs; is that correct?

3 A Yes.

4 Q All right. Let's look at Question 1. In Question 1,  
5 the Debtor listed income in 2003 and 2004, the two years  
6 preceding the case, a little over \$150,000 a year; is that  
7 correct?

8 A Yes.

9 Q And did you consider that fact in making the decision  
10 to go forward with proposed settlement?

11 A Yes.

12 Q Why was that important to you?

13 A Related to mitigation.

14 Q Okay. In fact in 2005 there's \$121,982 reported; is  
15 that correct?

16 A Yes.

17 Q Now, Mr. West, if you would turn over to Question 4 on  
18 Page 2 of Exhibit 4?

19 A Yes.

20 Q There's the listing of the original Morrison versus  
21 Amway lawsuit before Judge Harmon; is that correct?

22 A Yes.

23 Q It's Case Number 98-0352?

24 A Yes.

25 Q All right. Now, Mr. West, do you know by the style

1 number or do you otherwise know that this original lawsuit  
2 was filed in 1998?

3 A Yes.

4 Q And have you considered that fact in deciding whether  
5 or not to go forward with the proposed settlement?

6 A Yes.

7 Q Now, Mr. West, when you found out about this claim, did  
8 you do an investigation?

9 A Yes.

10 Q Did you review documents?

11 A Yes.

12 Q Did you contact the State Court Counsel?

13 A Yes.

14 Q Did you have conversations and meetings with them?

15 A Yes.

16 Q Did you review deposition transcripts?

17 A Yes.

18 Q Did you look at everything that anyone would give you  
19 regarding the claim?

20 A Yes.

21 Q Now, you actually made the decision to hire the  
22 existing State Court Counsel to pursue the claims, correct?

23 A Yes.

24 Q And what was the nature of the engagement that you  
25 reached with State Court Counsel?

1 A Contingency Agreement.

2 Q All right. And as we stand here today, what do you  
3 believe the applicable contingent fee percentage is?

4 A 40 percent plus expenses.

5 Q All right. And have you had concerns about what the  
6 expenses would be?

7 A Yes.

8 Q Have you attempted to limit the estate's liability  
9 regarding expenses?

10 A Yes.

11 Q Have you talked to Mr. Akers about his willingness to  
12 enter into a cap regarding the expenses?

13 A Yes.

14 Q And have you reached an agreement?

15 A Yes.

16 Q What's that agreement?

17 A 50 percent fee and expense.

18 Q So the total fees and expenses in the case will not  
19 exceed 50 percent of the recovery?

20 A Correct.

21 Q You are not agreeing to 50 percent, correct? You're  
22 just agreeing that there is a cap of 50 percent?

23 A Correct.

24 Q All right. So anybody who wants to contest Phillips  
25 and Akers fees, if they have standing to do it, they can do

1 it. You're not making any agreements. You're just saying  
2 it can never be more 50 percent, correct?

3 A Correct. It would have subject to court -- anything  
4 like that would have to be subject to court approval.

5 Q Right. Now, Mr. West, was reaching that agreement,  
6 something that you considered in making your decision to go  
7 forward with this agreement?

8 A Yes.

9 Q Now, Mr. West, I'd like for you to look at Exhibit 6.  
10 This is a claims docket for the case, correct?

11 A Yes.

12 Q Have you gone back, and without getting into the merits  
13 of each specific claim, have you attempted to determine the  
14 gross amount of claims outstanding, net of the Amway claims  
15 and net of any claims that have been withdrawn?

16 A Yes.

17 Q And, what's that number?

18 A Approximately, I believe around \$38,000.

19 Q All right and under the Bankruptcy Code, those  
20 claimants are entitled to interest?

21 A Correct.

22 Q And that interest is an ever-changing rate from 2005  
23 forward?

24 A Correct.

25 Q Have you actually sat down and tried to calculate what

1 the accrued interest is?

2 A I did a rough estimate. I believe it to be about  
3 \$7,000.

4 Q All right, so that's roughly \$45,000 of unsecured  
5 claims?

6 A Correct.

7 Q Is that a fair statement?

8 A Correct.

9 Q Now, if the settlement is approved, is it your belief  
10 that the estate is going have to prepared and file a tax  
11 return?

12 A Yes.

13 Q And have you attempted to estimate any tax liability in  
14 the estate?

15 A Yes.

16 Q And, what do you think that the total preparation and  
17 taxes due will be? Just, your best estimate?

18 A \$12,500.

19 Q Okay. Now, Mr. West, have you attempted to ascertain  
20 the amount of other administrative expenses that will have  
21 to be paid?

22 A Yes.

23 Q All right. Can you give us a range? I understand that  
24 you can't predict the future if there is an appeal or  
25 something like that. I understand you can't predict the



1 future, but what is your best estimate today of what the  
2 other administrative expenses would be?

3 A Approximately \$75,000.

4 Q Now, Mr. West, I tried to do rough math. We add that  
5 up, that's approximately \$135,000, give or take?

6 A Correct.

7 Q And, what is the, what was the gross recovery under the  
8 proposed settlement?

9 A A little over \$426,000.

10 Q All right and if you assume that Mr. Akers' is capped  
11 at 50 percent, --

12 A Correct.

13 Q -- that would leave roughly a little over 213 net to  
14 the estate?

15 A Correct.

16 Q And if you assume that your close on your estimate,  
17 then all claims would be paid in full, correct?

18 A Correct.

19 Q With interest, correct?

20 A Correct.

21 Q And there would actually be money going back to the  
22 Debtor; is that correct?

23 A Correct.

24 Q All right. Now, and Mr. West, did you consider the  
25 potential for that result in making your decision as to

1 whether or not to go forward with the settlement?

2 A Yes.

3 Q Now, Mr. West, in preparing for the mediation in May,  
4 did you solicit input from the Debtor regarding his thoughts  
5 about the case?

6 A Yes.

7 Q All right. Let's look at Trustee Exhibit 8. This is  
8 an email stream between you and Mr. Councill; is that  
9 correct?

10 A Correct.

11 Q All right, let's go to page 2, since that will be the  
12 earlier email. This was on Wednesday, May 12, 6:17 p.m.,  
13 correct?

14 A Correct.

15 Q This was your response to a letter or note from  
16 Mr. Councill, correct?

17 A Correct.

18 Q And, I'll just read it, you'll follow along. It says:  
19 "Dear Mr. Councill, Thank you for your letter. While  
20 I've been briefed on the lawsuit related issues by  
21 Brock Ackers, I welcome any input that you would like  
22 to provide regarding the quantification of the damages  
23 that have been incurred. It would be really helpful if  
24 you could send me a spreadsheet or memo outlining your  
25 perceived damages. Thank you, William G. West."

1 Correct? Did I read that correctly?

2 A Yes.

3 Q All right. And then if you turn to the first page, on  
4 Saturday, May 15 you got a response from Mr. Council,   
5 correct?

6 A Yes.

7 Q All right. And in it he attached a damage model from  
8 the underlying case that was prepared by the Plaintiff's  
9 expert which valued Mr. Council's damages at \$16,000,000  
10 correct?

11 A Yes.

12 Q All right. We'll talk about that in just a second.

13 I wanted to, if you'll go down to the bottom  
14 of the email, Mr. Council starts a paragraph read only:

15 "Bankruptcy has ruined my reputation as a business man  
16 just word bankruptcy means failure. My kids and wife  
17 have and do see me as a failure. I've had death  
18 threats and recorded them. I've been told before  
19 arbitration by the Amway Attorney Pierce that if I did  
20 not drop the case I would have to file bankruptcy and  
21 that he would take everything I owned of which came  
22 true."

23 Did I read that correctly?

24 A Yes.

25 Q Now, Mr. West, as you read this, I mean, did you

1 consider what Mr. Council was telling you?

2 A Yes.

3 Q And, let's go on with paragraph 1, it says:

4 "Amway et al they kept \$60K in money and bonuses and  
5 they 1099 me for them as an offset on the \$7 million."

6 Did you consider that fact in making your  
7 decision to accept the settlement?

8 A Yes.

9 Q Number 2 it says:

10 "Amway et al changed the rules after my bankruptcy to  
11 say that if a distributor filed bankruptcy they would  
12 take your Amway business. This business up until the  
13 day I filed, produced \$2 to \$3K per month and would  
14 have continued for years and years, people like the  
15 products. This business was willable and transferable  
16 when I joined."

17 Did I read that correctly?

18 A Yes.

19 Q Did you consider that fact when you made the decision  
20 to accept the settlement?

21 A Yes.

22 Q Number 3:

23 "The mental anguish that there were people so loyal to  
24 these Amway kingpins that they would threaten me and my  
25 family has been to say the least bothersome. I've had

1 to look over my back for 14 years."

2 Did you consider that statement in making  
3 your decision to accept the settlement?

4 A Yes.

5 Q Number 4:

6 "College for middle daughter had to stop in the second  
7 year at A&M because working two jobs, I could not pay  
8 for it. No one would loan me money."

9 Did you consider that statement when making  
10 the decision to accept the settlement?

11 A Yes.

12 Q But paragraphs 5, 6, and 7, did you read those and  
13 consider those in earnest in making the decision to go  
14 forward with the settlement?

15 A Yes.

16 Q So you didn't ignore Mr. Councill's feelings and  
17 thoughts about what was going on?

18 A I did not.

19 Q Now, I want to talk a little bit about the expert  
20 report that you got, and if you'd turn to page 3. Actually  
21 has the new page number 1 down at the bottom. It is  
22 entitled "Engagement Scope." Do you see that?

23 A Yes.

24 Q All right. And this is sort of the introduction of the  
25 expert report prepared for the Plaintiff's by Mr. Lawrence;

1 is that correct?

2 A Yes.

3 Q And prior to getting this, have you seen this document?

4 A Yes.

5 Q All right. And if you look at the last page, there's a  
6 model doing a calculation of numbers, for lack of a better  
7 term, correct?

8 A Yes.

9 Q All right. Now, when you first saw this, did you  
10 undertake an analysis of this report?

11 A Yes.

12 Q In fact, did you obtain the transcript of the  
13 arbitration hearing where Mr. Lawrence testified?

14 A Yes.

15 Q And did you discuss how the testimony went with your  
16 counsel?

17 A Yes.

18 Q And, again, I don't want to cast dispersions on anyone,  
19 how would you categorize the testimony of Mr. Lawrence and  
20 the validity of his report?

21 A I found it somewhat hard to believe him.

22 Q Did Mr. Lawrence in fact admit that the damage model  
23 was based upon information that had no tie to reality?

24 A Yes.

25 **MR. BECK:** We'll object to that, Your Honor as

1 hearsay. If he's got a copy of the transcript, we welcome  
2 to introduce that or read from it. But just to reproduce  
3 his testimony here through second hand, we have hearsay  
4 objection.

5 **MR. JONES:** Happy to do that, Judge.

6 **THE COURT:** I'll sustain the objection.

7 **(Pause)**

8 **MR. JONES:** Judge, may I approach? I only have  
9 one copy of this.

10 **THE COURT:** Why don't you put it on the screen and  
11 that way Mr. Beck can see it at the same time. It should be  
12 up when you turn it on.

13 **BY MR. JONES:**

14 Q All right, Mr. West, can you see that?

15 **MR. JONES:** Judge, is there anyway to make it  
16 clearer or better?

17 **THE COURT:** Yeah you just need to learn to work  
18 the technology.

19 **MR. JONES:** That's fair enough.

20 **THE WITNESS:** I see it.

21 **BY MR. JONES:**

22 Q You can see that?

23 A Yes.

24 Q All right. Now if you look down at the bottom, this is  
25 testimony -- and you've reviewed this, correct, Mr. West?

1 A Yes.

2 Q And you've relied upon this transcript in making your  
3 decision to go forward with the proposed settlement,  
4 correct?

5 A Yes.

6 Q All right. Now, read down to line 21, you just read  
7 along with me:

8 "Q Your model, which in the original one estimates  
9 more than \$117 million in total, it assumes that every  
10 claimant will reach diamond qualification regardless of  
11 their actual performance prior to 1997; is that  
12 correct?

13 "A Correct."

14 Did I read that correctly?

15 A Yes.

16 Q All right. Going on to the next page,

17 "Q Okay, for example you did not take into account  
18 the actual profits or losses on their tax returns  
19 during the relevant period of time, right?

20 "A Correct."

21 Now, Mr. West, have you ever done economic  
22 loss calculation of the CPA or as a Trustee?

23 A Yes.

24 Q Are actual profit and losses important to you in  
25 determining what the amount of loss is?



1 A Yes.

2 Q Let's go a little further into the testimony. Line 18:

3 "Q Okay, but the problem with data that went into  
4 your model is that you just took numbers from these  
5 questionnaires and you didn't check them or compare  
6 them with each other, right, to see if the were  
7 plausible?

8 "A That's correct."

9 Did I read that correctly?

10 A Yes.

11 Q Starting at Line 25:

12 "Q You did not even attempt to connect the dots  
13 between all these claimants on the front end of the  
14 model and look if it would make sense with this whole  
15 -- we have a group here. They were all arraigned the  
16 same way. I mean, if it would make sense that if this  
17 guy had 500 and this guy 800 and this guy had this, you  
18 never did that, right?

19 "A No. That didn't happen."

20 Now, that was doing the math to see if the  
21 down lines all matched up together, correct?

22 A Yes.

23 Q All right, going on in the testimony, on Line 11:

24 "Q It went unchecked. It went unchecked. The number  
25 came into your model unchecked; is that right?

1 "A It, it the way you describe it, you know, you  
2 could say that."

3 Did I read that correctly?

4 A Yes.

5 Q Going on:

6 "Q You didn't consider the actual historical  
7 performance at all, right?

8 "A I had no records."

9 Line 16:

10 "Q I guess the bottom line of at this point is just  
11 that the data was unchecked right. You didn't check  
12 it. You just put it in your model from the  
13 questionnaire; is that right? You didn't check it.  
14 When I say unchecked, you didn't look at the actual  
15 historical performance. Instead, you let them take  
16 whatever wild imagination they had that their business  
17 would have been like if they said it was going to be  
18 this, you took that information, you plugged it into  
19 your model, right? You plugged it into the model what  
20 they felt number one, their number of down line  
21 distributors would have been in 1997 and the year they  
22 thought they would have gone diamond, right? And that  
23 was unchecked?

24 "A That's basically correct."

25 A little further down:

1 "Q In admission by the expert, this model was never  
2 meant to be precise and it could not be precise."

3 Again, Mr. West, did you rely on this  
4 testimony in assessing the credibility of that damage  
5 report, in deciding to go forward with the settlement?

6 A Yes.

7 Q "Q Didn't analyze the information to see if it was  
8 accurate, right?

9 "A You mean the group?

10 "Q Yes, sir.

11 "A Information --

12 "Q Any of the information to see if was accurate that  
13 they gave you?

14 "A That would be a fair statement."

15 And at the end of the examination:

16 "Q Virtually every one of the damage calculations  
17 that you've made is wrong, yes?

18 "A Mathematically, yes or classification-wise, yes."

19 Now, Mr. West, did you consider the problems  
20 with the expert's testimony and the damage model that  
21 presented at arbitration, did you consider that in making  
22 your decision whether or not to accept the proposed  
23 settlement?

24 A Yes.

25 Q Now, Mr. West, you went to mediation, correct?

1 A Correct.

2 Q And toward the end of the mediation, you actually got  
3 another communication from Mr. Councill; is that correct?

4 A Yes.

5 Q All right. Let's turn to Trustee Exhibit 9.

6 Actually, before we do that, Mr. West, did  
7 you ever attempt to do your own analysis of what the claims  
8 were really worth?

9 A Yes.

10 Q All right. Now, I think you previously testified you  
11 had conversations with Mr. Akers, correct?

12 A Yes.

13 Q Did you also attempt to do your own -- sort of your own  
14 analysis based upon the information that you had available  
15 to you?

16 A Yes.

17 Q All right. Let's turn to Trustee Exhibit 11. And what  
18 is this document?

19 A A worksheet summary from information from tax returns  
20 of the Debtor.

21 Q Okay. And was this information used during arbitration  
22 and accepted by both Amway, by the Amway parties, as well as  
23 the Plaintiff parties?

24 A That's my understanding.

25 Q Right. And did you take this information --

1           **THE COURT:** Excuse me, just, did you say it was  
2 used at the mediation or that it was used at the  
3 arbitration?

4           **THE WITNESS:** Excuse me, the arbitration.

5           **MR. JONES:** If I said mediation, then I was wrong,  
6 it's the arbitration.

7           **THE COURT:** No, you may have said arbitration, I  
8 just thought mediation, I just wanted to be sure I heard it  
9 right. This was used at the arbitration?

10          **THE WITNESS:** This was used, yes, sir.

11          **THE COURT:** Okay. Thank you.

12 **BY MR. JONES:**

13 Q In fact, so that we're clear, Mr. West, did this come  
14 out of Amway's expert's report?

15 A Correct.

16 Q All right. And it wasn't challenged by the Plaintiff's  
17 in terms of the content or the data, correct?

18 A Correct.

19 Q Now, Mr. West, did you look at those bottom line  
20 numbers in terms of the net income in an effort to value the  
21 claims?

22 A Yes.

23 Q And did you consider this information in reaching your  
24 decision to go forward with the settlement?

25 A Yes.

1 Q Now, you didn't have actual copies of tax returns from  
2 1990 to 2001, did you?

3 A No.

4 Q You did have some of them, correct?

5 A Yes.

6 Q And did you verify the information for the ones that  
7 you had?

8 A Yes.

9 Q Now, Mr. West, let's go back to Exhibit 9.

10 A All right.

11 Q This is an email from Mr. Council?

12 A Yes.

13 Q To you toward the conclusion of the mediation, correct?

14 A Yes.

15 Q All right. And in fact you just read the first line,  
16 if you'd along with me it says:

17 "All, please note that I object to agreeing to any  
18 offers from the Defendants in the *Morrison v. Amway, et*  
19 *al* case from my bankruptcy estate for the following  
20 reasons."

21 And then it lists some reasons, correct?

22 A Yes.

23 Q All right I want to go through some of those. All  
24 right. The first reason that Mr. Council gives, it says:

25 "It is not clear to me who is representing our interest

1 (as Debtors) in this matter. I understand their  
2 original attorney was also hired by the Trustees.  
3 Don't know how Brock Akers/Craig Cowgill can represent  
4 us and the Trustees especially since we have different  
5 goals in this mediation. I have not been thoroughly  
6 advised on what fiduciary responsibility, if any, the  
7 Trustees owe the Debtors. It would seem to me to be a  
8 conflict of interest for anyone to represent the  
9 Trustees, as well as the Debtors in this matter."

10 Did I read that correctly?

11 A Yes.

12 Q And did you consider this objection that Mr. Councill  
13 had to the process?

14 A Yes.

15 Q Did it in any way effect your decision regarding the  
16 viability of the proposal?

17 A No.

18 Q Let's go to number two:

19 "As I have continually asked my counsel (including  
20 written request) for a proper and professional damage  
21 assessment be conducted for losses in the underlying  
22 case as well as the damages caused by the bankruptcy.  
23 David Roberts and I went as far as researching and  
24 meeting with a viable candidate firm to conduct this  
25 damage assessment and develop a model for all

1 Plaintiffs that can be used for the Plaintiffs' cases.  
2 At Brock's request, we even provided their contact  
3 information. Brock never contacted them. We even went  
4 as far as offering to pay for this expense ourselves.  
5 I was informed by Brock that he overlooked the deadline  
6 to designate such an expert."

7 Did I read that correctly?

8 A Yes.

9 Q And did you consider this statement in making your  
10 decision to go forward?

11 A Yes.

12 Q Number 3:

13 "The failure of the Trustees and their counsel to have  
14 an arguable, professional and competent damage model  
15 that can be defended has seriously crippled us and any  
16 effort to mediate these cases."

17 Did I read that correctly?

18 A Yes.

19 Q Now, the only damage model that you see is the one  
20 that, other than the one you did yourself, is the one that  
21 Mr. Council sent you, correct?

22 A Yes.

23 Q Number 4:

24 "A damage model was provided to my Trustees and  
25 Trustees' counsel without my input advice for approval.



1 I am not agreeing with the damage model provided as it  
2 only relay's on tax returns and has zero provision for  
3 damages as a result of the bankruptcy. Any competent  
4 damage expert will attest that tax returns are only  
5 part of the equation in determining damages. There has  
6 not been a damages expert conduct any model or  
7 estimates since our bankruptcy filing. That alone  
8 should send up all kinds of warning signs."

9 Did I read that correctly?

10 A Yes.

11 Q Now, and Mr. West, did you consider that fact?

12 A Yes.

13 Q Now, in fact, did you investigate what damages could  
14 exist from a party voluntarily filing bankruptcy?

15 A Yes.

16 Q Now, did you look to see if there'd been any collection  
17 activity against any of the Debtors?

18 A Yes.

19 Q And with respect to Mr. Council other than abstracting  
20 the judgment, was there any collection activity at all?

21 A I don't know of any.

22 Q Never saw any writs of execution?

23 A No.

24 Q Never saw any request for receiver?

25 A No.

1 Q Never saw any writs of garnishment?

2 A No.

3 Q Nothing?

4 A No.

5 Q So, Mr. Council made the decision, filed bankruptcy on  
6 the Friday before the law changed in Order to take advantage  
7 of the existing law, fair statement?

8 A Yes.

9 Q All right. Now, Number 5:

10 "The mediator and Trustee's counsel have made offers to  
11 various Defendant's groups without my approval or  
12 input."

13 That's a true statement, correct?

14 A Yes.

15 Q Okay.

16 "All though I am not clear if the Trustee's need of our  
17 approval, the latest round of offers, would not be  
18 offers I would approve especially since no plan has  
19 been indicated how such a settlement would be divided."

20 Did I read that correctly?

21 A Yes.

22 Q Now, in fact, Mr. West, there already been discussions  
23 amongst the Trustee with a relative weighting obtained from  
24 Mr. Akers, correct?

25 A Yes.

1 Q And you are using that weighting as every offer came in  
2 to evaluate the claim on behalf of your estate; is that  
3 correct?

4 A Yes.

5 Q All right. Now, I want to turn over to the second  
6 page. And the paragraph that begins "That being said," I  
7 want you to read along with me. It says:

8 "That being said, if a settlement is reached wherein  
9 George and Janet's bankruptcy estate is settled, all  
10 parties agree to petition the court to reverse the  
11 bankruptcy filing by court Order (correct credit bureau  
12 files and whatever is necessary) and we are able to net  
13 at least \$200,000 after all court expenses, mediation  
14 costs and attorney's fees, we will agree to forego what  
15 will surely be a lengthy, but necessary process for us  
16 to be justly compensated, the actual damages my family  
17 has suffered due to the Defendant's actions."

18 Did I read that correctly?

19 A Yes.

20 Q Mr. West, regardless of whether this is right or not,  
21 did you consider Mr. Councill's strong feelings in deciding  
22 whether or not to proceed with the settlement?

23 A Yes.

24 Q All right. Now, Mr. West, after, after the Settlement  
25 Agreement that was entered into amongst the parties, did

1 Mr. Councilll hired a lawyer to file an objection; is that  
2 correct?

3 A Correct.

4 Q And did you read that objection.

5 A Yes.

6 Q And did you have the opportunity to discuss the nature  
7 of those objections with counsel?

8 A Yes.

9 Q Was there anything in those objections that caused you  
10 to take pause and say "Maybe I didn't think about  
11 something?"

12 A No.

13 Q But you considered what he had to say in terms of  
14 objecting to the proposal?

15 A Yes.

16 Q Now, Mr. West, did you also receive a letter, dated  
17 September 14, 2010 to Brock Akers from Mr. Roberts and  
18 Mr. Councilll?

19 A Yes.

20 Q Now let's turn to Exhibit 10. And this is a letter,  
21 please read along with me, first paragraph, it says:

22 "As you are probably already aware an objection to this  
23 motion of compromise was filed with Judge Isgur and  
24 Judge Clark late Monday, 9/13/2010, for both David  
25 Roberts and Randy Councilll in regard to our respective

1 bankruptcy cases."

2 Reading on:

3 "While it is appreciated that Phillips and Akers has  
4 told with the underlying case for nearly 13 years, many  
5 of the delays were in fact caused by the actions or  
6 non-actions of your firm. Phillips and Akers has some  
7 serious issues regarding how this underlying case was  
8 handled in the early stages, which are not limited to  
9 the following examples. Number one, your firm was  
10 aware that Amway was going to launch an arbitration  
11 scheme on January 1, 1998 and despite our repeated  
12 pleadings to firm to file suit before the arbitration  
13 took effect, didn't file the suit until January 8, 1998  
14 thus loosing the advantage of having our dispute  
15 recorded before the Defendant's scheme took effect.

16 "Number two: It has been, it is very arguable that  
17 had the suit been filed timely, as requested, the  
18 Plaintiff's would have not been forced into an  
19 unfavorable arbitration scheme which ultimately  
20 resulted in personal bankruptcy which cannot be  
21 reversed or remedied and have become permanent parts of  
22 our personal credit histories.

23 "Number three. Phillips and Akers represented to  
24 the Plaintiffs in no uncertain terms that the firm had  
25 the financial resources to pursue a suit of this

1 magnitude, including covering the expense of giant  
2 discovery load, when in fact, in most scenarios, the  
3 firm used an intern or a junior attorney right out of  
4 law school as the primary resources devoted to the case  
5 through out the nearly 13-year history."

6 **MR. BECK:** Your Honor, at this point, I'd just  
7 like to object to the fact that, this document is already in  
8 the record. If we are just going to sit here and read the  
9 document without asking a question, he can sit, we can  
10 pause, he can read the document himself. Let's get back to  
11 a question.

12 **THE COURT:** What's the point of the letter,  
13 Mr. Jones? It's admitted, I agree, but what are you trying,  
14 what's your point?

15 **MR. JONES:** Judge, the point of the letter is  
16 two-fold. Number one, we're going to get to the fact that  
17 in fact you see, number one these claims would be estate  
18 property. Number two, there is then on page two, an attempt  
19 to get Mr. Akers to extort him, as part of his fee, in order  
20 to withdraw their objections to the compromise. That is  
21 clearly relevant to the Trustee's decision in evaluating the  
22 credibility of the Witnesses and what to do, because he  
23 didn't stop his decision process when the motion got filed.  
24 He's continued to look at objections filed by the parties,  
25 as well as this letter complaining about all the things that

1 were mishandled in the case by Phillips and Akers.

2           **THE COURT:** I read the letter before I came out.  
3 So why don't you ask him the question that you want to ask  
4 him which is I think your only question him, which I think  
5 Mr. Beck's point is, did you consider the letter, right? Do  
6 you have some other question?

7           **MR. JONES:** I do have a couple of other questions  
8 if I am permitted to ask them.

9           **THE COURT:** Go ahead. But I do think it is a  
10 waste of everybody's time just to read it, so.

11           **MR. JONES:** Well, I wanted it to be clear, Judge  
12 and I'll make the announcement on the record: A letter was  
13 sent to Mr. Roberts and Mr. Councilll saying you don't own  
14 these claims and you ought to talk to a lawyer because we  
15 think Title 18 is implicated. We forwarded the letter to  
16 the U.S. Trustee and there's been discussion with the U.S.  
17 Trustee as to the effect of this letter. I simply wanted  
18 all that on the record because I think it's part of the  
19 decision process in deciding what to do with these claims.

20           **THE COURT:** That's fine. I don't think we need to  
21 go read the letter out loud so.

22 **BY MR. JONES:**

23 Q Mr. West, you've read Trustee's Exhibit 10, correct?

24 A Yes.

25 Q And each and every one of the points that were raised

1 by Mr. Councill and Mr. Roberts you considered, did you not?

2 A Yes.

3 Q And in fact, is it your opinion that if, in fact, these  
4 were true, that it actually supports your decision to go  
5 forward with the settlement?

6 A Yes.

7 Q Now, Mr. West, after looking at all of the documents  
8 available in the case, looking at all the testimony that  
9 you've been provided, do you think that you have considered  
10 all of the relevant information necessary to make an  
11 informed decision?

12 A Yes.

13 Q All right. Now Mr. West, one of the complaints raised  
14 by Mr. Councill is that with respect to the adversary from  
15 Judge Isgur 08-3260, that you did nothing to value the  
16 claims. Do you recall that objection?

17 A Yes.

18 Q Is that a true statement?

19 A No.

20 Q Please tell us what you did in Order to understand what  
21 that lawsuit was about.

22 A It had to do with fraud in the arbitration and the  
23 damages related to that.

24 Q Did you have multiple meetings with Mr. Akers regarding  
25 his damage theory?



1 A Yes.

2 Q All right. Did you have multiple conversations with me  
3 about my concern about the damage model?

4 A Yes.

5 Q All right. What was Mr. Akers damage model for that  
6 lawsuit?

7 A Attorney's fees.

8 Q And on what did he base the attorney's fees?

9 A Well, he was engaged on a contingency.

10 Q What about of attorney's fees had been incurred either  
11 by the Debtors or by the estate up to that point?

12 A On that adversary?

13 Q Yes, for the arbitration?

14 A None to my knowledge.

15 Q All right. And, in fact, has there ever been a proof  
16 of claim filed in the case by anyone asserting an attorney's  
17 fee claim?

18 A No.

19 Q Did that cause you concern?

20 A Yes.

21 Q All right. And I think you previously testified you  
22 also attempted to understand if there was a viable damage  
23 theory for someone filing bankruptcy when no one was  
24 attempting to take their property, correct?

25 A Yes.

1 Q And based upon that, did you have serious concerns  
2 about whether or not that was a viable lawsuit?

3 A Yes.

4 Q Did you consider all of that in making your decision to  
5 accept \$426,000 and change in Order to resolve the estates  
6 claims against the Amway parties?

7 A Yes.

8 Q And Mr. West, how long have you been a Trustee?

9 A Nineteen years.

10 Q All right. And in that time, do you think you've  
11 presided over 10,000 or more cases?

12 A Yes.

13 Q And you've done lots of motions to compromise under  
14 rule 9019?

15 A Yes.

16 Q All right. Mr. West, do you believe that the proposed  
17 settlement is in the best interest of the estate?

18 A Yes.

19 Q And given all that you've heard, all that you've read,  
20 including the objections by the Debtor, are you still asking  
21 the court to approve the settlement as filed?

22 A Yes.

23 **MR. JONES:** Judge, I don't have anything further.

24 **THE COURT:** Thank you.

25 Mr. Sparacino, since you're aligned with

1 Mr. Jones, I want to get your questions out of the way so  
2 that Mr. Beck is only dealing with a single line of attack.  
3 I don't know if you have anything, but if you do, go ahead.

4 **MR. SPARACINO:** I was willing to let Mr. Beck go  
5 first, but --

6 **THE COURT:** Well, I'd rather, I think he'd  
7 probably prefer to know what the whole case is going to be  
8 before he goes.

9 **CROSS-EXAMINATION OF WILLIAM WEST**

10 **BY MR. SPARACINO:**

11 Q Good afternoon, Mr. West. I'd like you to turn back to  
12 the Trustees Exhibit Number 1 - excuse me, Exhibit 3.

13 A Yes.

14 Q Correction again, Exhibit 4, the SOFAs, the Statement  
15 of Financial Affairs.

16 A Yes.

17 Q And specifically again focus on question number one.

18 A Yes.

19 Q In which the Debtor is suppose to identify income from  
20 employment or operation of business for the proceeding two  
21 years -- for the current year and the proceeding two years,  
22 correct?

23 A Yes.

24 Q And you see the amounts that are identified, correct?

25 A Yes.

1 Q Amounts, sources are identified as water works, utility  
2 and Telegistics for 2003; is that correct?

3 A Yes.

4 Q Another source for 2004 is water works, utility and  
5 Telegistics, Inc.; is that correct?

6 A Yes.

7 Q And for year to date 2005, the source is Telegistics,  
8 correct?

9 A Yes.

10 Q Do you see anywhere in there a disclosure of any income  
11 earned from an Amway business?

12 A No.

13 Q Would that, what factor into your assessment as to the  
14 credibility of this Debtor?

15 A Yes.

16 Q Do you recall earlier in this bankruptcy case, there  
17 was an adversary proceeding commenced by the Debtors,  
18 Mr. and Mrs. Councill, against Amway?

19 A Yes.

20 Q And do you generally recall that that adversary  
21 proceeding the complaint asserted or sought recovery of  
22 post-petition Amway business bonus dollars that were  
23 allegedly due and owing them, according the Debtors?

24 A Yes.

25 Q Do you recall that you, as Trustee, took a position

1 regarding who owned those claims?

2 A Yes.

3 Q And do you recall that your position was that the  
4 Trustee, the estate owned those claims?

5 A Yes.

6 Q Do you continue today to believe that the Trustee of  
7 the estate owns and controls the claims for post-petition  
8 Bonuses generated by the business?

9 A Yes.

10 **MR. SPARACINO:** I have no further questions,  
11 Judge.

12 **THE COURT:** Thank you. All right, Mr. Beck.

13 **MR. BECK:** Thank you, Your Honor.

14 **CROSS-EXAMINATION OF WILLIAM WEST**

15 **BY MR. BECK:**

16 Q All right, Mr. West, you have testified of many things  
17 that you did look at in doing a damage evaluation for  
18 accepting this compromised and Settlement Agreement; is that  
19 right?

20 A Yes.

21 Q And you understand from our objection, it's really at  
22 this point I think we've dealt with one issue, but it is  
23 two-fold that there was no separate evaluation of the '08  
24 adversary proceeding based on the claim of fraud for the  
25 arbitration shenanigans, we'll call them, that went on with

1 regard the underlying suit, do you understand that to be one  
2 of our positions?

3           **MR. JONES:** Judge, just for the record, the  
4 statement was the '08 adversary. We ought to have a number,  
5 because I actually think there was more than one piece of  
6 litigation filed in '08. If we just get the full adversary  
7 number for the record.

8           **THE COURT:** 08-3260.

9 **BY MR. BECK:**

10 Q Do you understand that that was based --

11 A Yes.

12 Q That wasn't based on the initial Amway business or  
13 anything like that was it?

14 A Correct.

15 Q That was based simply on what happened with regard to  
16 the arbitration agreement and the underlying arbitration.

17 A Correct.

18 Q And, what did you do or look at to put any type of  
19 value on that particular portion of what was being settled  
20 in the mediation?

21 A None.

22 Q Okay, and so as far as that portion of the claim as  
23 being settled, you didn't put any value to it at all?

24 A No.

25 Q Why not?

1 A It was basically based on attorneys' fees that weren't  
2 paid.

3 Q Did you consider the time and effort put in by the  
4 Plaintiffs, and in this case particularly Mr. Council and  
5 his family with having to be involved in that arbitration  
6 proceeding?

7 A Yes.

8 Q And what value did you put on that?

9 A None.

10 Q How much time did you consider how much time did you  
11 estimate Mr. Council and his family had to put in with  
12 regard to participating in that procedure that we all know  
13 was a basis for reversal of the judgment?

14 A I do not know.

15 Q Did you ever address that with Mr. Council or ask  
16 Mr. Council what amount of time that he spent on that?

17 A No.

18 Q Did you ever talk to him about any sleepless nights,  
19 any burning the midnight oil preparing for that kind of  
20 thing?

21 A No.

22 Q Did you ever discuss with his wife any feelings she may  
23 have had with regard to what was going on with that  
24 arbitration?

25 A No.

1 Q Did you read the opinion of the Court of Appeals that  
2 reversed that arbitration award that was made by Judge  
3 Hammond?

4 A I remember reviewing it at one time, but I can say  
5 specifically when.

6 Q Okay. Did you review it at any point when you were  
7 coming to a conclusion as whether or not this was a fair and  
8 adequate value for settlement of the estates interest in  
9 this case?

10 A I don't recall.

11 Q In valuing the settlement for the adversary proceeding,  
12 I believe you said you talked to Mr. Akers about what his  
13 damage model was, did you do any other, you didn't talk with  
14 Mr. Councill, did you do anything else do an independent  
15 valuation of what that was worth? Anything else but to talk  
16 to the lawyer who was filing the suit?

17 A I don't recall.

18 Q So if there was anything you did, you certainly didn't  
19 consider it as far as trying to say whether or not we had a  
20 fair value on the settlement; is that right?

21 A I reviewed the information that was available to me.

22 Q Okay, Mr. Councill, through letters, made himself  
23 available, didn't he?

24 A I think the letters I got from him were the day before  
25 the mediation or so.



1 Q But you had been his Trustee for about five years?

2 A Correct.

3 Q And the case had been on-going since 2008?

4 A Correct.

5 Q As far as just the fraud case?

6 A Correct.

7 Q But you made no other effort to contact him and see  
8 what his feelings were or, let me understand, you've read  
9 the amended complaint in that case; is that right?

10 A I'm sure I did.

11 Q And you understand that the damages set forth that were  
12 being claimed in there had to do a lot more than just  
13 attorney fees didn't they?

14 A I don't recall.

15 Q I don't think you have it front of you now.

16 **MR. BECK:** May I approach the witness, Your Honor?

17 **THE COURT:** Yes, sir.

18 **BY MR. BECK**

19 Q I am going to hand you what's been marked as Exhibit 4  
20 by the Debtor's.

21 **MR. SPARACINO:** Mr. Beck, do you have --

22 **BY MR. BECK:**

23 Q And if you would, please turn to page 29 of that  
24 document.

25 A All right.

1 Q With the heading "Damages" in the middle of the page,  
2 paragraph 29 states:

3 "Each of the Plaintiffs has suffered extreme damages as  
4 a result of the scheme to force Plaintiffs into an  
5 arbitration system that only Defendants knew was  
6 essentially fixed from the start and the subsequent  
7 efforts of Defendants to collect the arbitration award.  
8 This lawsuit, which reflected a culmination of life  
9 work of many of these Plaintiffs was delayed by a  
10 decade as a result of the farce of an arbitration  
11 hearing before the arbitrator who was corrupt pursuant  
12 to the arbitration scheme which was unenforceable.

13 "The delay and the cost of the arbitration itself,  
14 which was absorbent to the extreme, was the direct and  
15 approximate result of Defendant's conduct. The  
16 arbitration resulted in a risk of absolute and complete  
17 financial ruin, just as the defense had predicted  
18 rather than simply running the risk of losing their  
19 lawsuit, the arbitration scheme (which they claimed was  
20 developed for the benefit of the individual Plaintiffs)  
21 had a loser payout provision.

22 "The result was an arbitrational award \$6 million  
23 against the Plaintiffs. Defendant took steps to  
24 collect this award and further ruined the credit  
25 worthiness of the Plaintiffs. Many of the individuals

1           affected by this award actually paid money to the  
2           Defendant to erase their liability."

3                       Again, did you do anything to investigate as  
4 far as Mr. Councill is concerned what toll this arbitration  
5 award had on him and his family? What financial toll it had  
6 on them? What physical toll? What mental toll? Did you  
7 consult any physicians? Did you talk to anybody?

8   A       No.

9   Q       Did you consider if these provisions and the suit  
10 represented by Exhibit 4 was tried, is it your position that  
11 any punitive damages would be likely?

12   A       I couldn't say.

13   Q       Before today, when's the last time you saw this  
14 document?

15   A       I don't recall.

16   Q       Do you recall if you reviewed it at any time during the  
17 mediation?

18   A       I don't believe so.

19   Q       So as far as the damages that were sought in this  
20 complaint, you don't recall having reviewed those at the  
21 time you made the decision to accept this?

22   A       I recall the attorney's damages cause that had been  
23 discussed.

24   Q       But you didn't do an independent evaluation on your  
25 own?

1 A Other than, other than, no, other than discussing the  
2 attorney's fees.

3 Q By way of hypothetical, if a Debtor had a non-exempt  
4 piece of real estate that you needed to sell in Order to  
5 maximize the benefit to the creditors and the bankruptcy,  
6 wouldn't you get an appraisal? Would you make some sort of  
7 effort to value that property before you took a bid on it or  
8 even started the process of putting it on the market?

9 A It depends if it was readily ascertainable or not and  
10 the sources of the estate, the Chapter 7 Estate, to be able  
11 to take on that expense.

12 Q So there's a lot of things you need to consider, but  
13 generally speaking, isn't it the duty of the Trustee to look  
14 at those things?

15 A To look, yes.

16 Q As we discussed in this case, at least with regard to  
17 the claim represented by Exhibit 4, there wasn't much that  
18 we looked at aside from what maybe Brock Akers thought he'd  
19 get in attorney fees?

20 A Correct.

21 Q I'd like to draw your attention back to, I think we've  
22 looked at of the exhibits your counsel put forward,  
23 Exhibit 11.

24 A Yes.

25 Q Counsel asked you at one point if you had done, and I'm

1 backing up now to the original lawsuit that was filed in '05  
2 that spurred on the arbitration award, counsel asked if you  
3 had done your own independent investigation on the damages  
4 set forth in that case, and I think you answered yes. But  
5 this is not what you did; is that right, Exhibit 11, you did  
6 not create this document?

7 A No.

8 Q This document was actually created by one of the Amway  
9 Entities involved in that arbitration?

10 A As I had said earlier.

11 Q And that goes with page 1 and 2, Exhibit 11; is that  
12 right?

13 A Yes.

14 Q It is fair to say that these documents were produced in  
15 anticipation or participation in litigation?

16 A Arbitration.

17 Q Arbitration, sure. And they were, I mean if you are  
18 going to produce a document to support your own position,  
19 you're going to skew it to your own side, aren't you?

20 A Yes, but it is my understanding these were not objected  
21 to.

22 Q And how did you come by that understanding?

23 A By my counsel.

24 Q But were you at the arbitration?

25 A No.

1 Q So you know for sure whether or not there was any type  
2 of objection raised by Mr. Akers or anybody on the  
3 Plaintiff's side on that matter?

4 A No.

5 Q And with regard to the transcript that we went over  
6 looking at Mr. Lawrence's damage model, who was asking the  
7 questions in that transcript? Do you know which attorney?

8 A I don't recall.

9 Q Do you have -- well, let me ask you this: It's fair to  
10 say that if it was one the Amway's parties attorneys, it was  
11 their job to discredit that report, isn't that true?

12 A Yes.

13 Q And whether the report was creditable or not, the  
14 attorneys job that day in that arbitration was to do  
15 anything he could to discredit it, isn't that right?

16 A Within reason.

17 Q I think that you've testified that you've done the same  
18 kind of damage model and I think you have it there, we'll  
19 just use the one which you've already got in front of you.  
20 It's attached to Exhibit 8. When you have it in front of  
21 you, I'm going to refer to it. And this is the one that was  
22 prepared just for Mr. Council; is that correct?

23 A Yes.

24 Q And on page two, it says:

25 "Based on the calculation, the net present value of

1 damages is \$16,638,943."

2 And that's what it says on page two; is that  
3 right?

4 A Yes.

5 Q Did you ever talk to Mr. Lawrence about that number?

6 A No.

7 Q Why not?

8 A I reviewed that report.

9 Q Is there anything in this report, in and of itself,  
10 that would make you doubt that number? Just as it sits  
11 there not going into the transcript, not going into what  
12 your counsel told you, just looking at that number?

13 A From his responses, I questioned these numbers.

14 Q And that's his response to questioning at the  
15 arbitration hearing; is that right?

16 A Correct.

17 Q But you didn't take the opportunity at that point to  
18 contact Mr. Lawrence and ask him what his situation was with  
19 regard to that?

20 A No.

21 Q And I believe you've testified that you've done these  
22 types of damage models in the past yourself; is that right?

23 A No, I reviewed.

24 Q Reviewed? Okay. And then I ask again then on the face  
25 of this without regard to the questions asked in

1 arbitration, where do you see the flaw in this damage model?

2 A The flaw is in the description in the questioning of  
3 Mr. Lawrence of how he got these numbers.

4 Q Okay, so again but you never talked to Mr. Lawrence  
5 about where he got them, did you? Or talk to him about his  
6 testimony in the arbitration?

7 A No. I also compared it to the Exhibit 11 from the  
8 Debtor that was pulled from the Debtors tax returns.

9 Q Did you review those tax returns to see if all those  
10 numbers were accurate on Exhibit 11?

11 A 2000 and 2001.

12 Q We have established now that this Exhibit 11 that was  
13 produced by Amway; is that right?

14 A Correct.

15 Q And of course their trying to low-ball because that's  
16 what they do for their clients; is that right?

17 A I don't believe so.

18 Q Let me ask it to you this way, in accepting or deciding  
19 this was a fair and adequate settlement, did you rely more  
20 on Exhibit 11 than anything else?

21 A No.

22 Q How much weight do you think you put on that exhibit,  
23 the damage model produced by Amway, in accepting their offer  
24 to settle?

25 A I can't quantify that. I considered numerous issues in



1 this case. I think Mr. Jones probably asked me a couple  
2 hundred questions did I consider this and I answered I think  
3 most of them, "yes."

4 Q Right. And what I'm trying to come up with though, is  
5 with regard to the actual damage number itself, what did you  
6 look at, what did you feel going into that settlement,  
7 Mr. Councill's actual damage number was?

8 A I didn't have a specific opinion.

9 Q Then how is it that you formulated that a fair and  
10 adequate settlement was \$426,000 and some change?

11 A I considered a number of factors. I considered this  
12 Exhibit 8 and this Exhibit 11. I considered what the Debtor  
13 had filed on his Schedules and Statement of Financial  
14 Affairs and the tax returns that had been turned over to me.

15 Q At the time that the Schedules, Statement of Financial  
16 Affairs were filed, there was already a judgment in place,  
17 was there not?

18 A I believe so.

19 Q And so, and the Debtor did disclose the fact that the  
20 court case was still pending and it was in appeal and put a  
21 value on it at that point?

22 A Yes.

23 Q And the value on that was about, I believe it was  
24 \$6.7 million, does that sound about correct?

25 A Yes.

1 Q I think we have it if you need to refer to it.

2 Did you consider that number?

3 A I considered -- yes, I considered the number.

4 Q Okay. Did you do any independent investigation as to  
5 whether that number, where that number came from what the  
6 value was?

7 A No. I did compare it to this again to Exhibits 8 and  
8 11 and --

9 Q What specifically on Exhibit 8 are you pulling from on  
10 there?

11 A Well, if you look at these totals, discounted totals  
12 and the totals in this right-hand column, I'm not quit sure  
13 where isn't that number on the schedules came from.

14 Q Just so the Court and the record is clear, on Exhibit 8  
15 you are looking at the spreadsheet on the last page?

16 A Correct.

17 Q And that spreadsheet shows and I'll just start with  
18 2006 through the end of the line there between 2006 and  
19 2054, approximately \$811,835 in product income?

20 A Yes.

21 Q Another \$1.3 million and some change in tool income?

22 A Right.

23 Q For a total income of \$2.1 million over a 48-year  
24 period?

25 A Can you just repeat that?

1 Q It is a total income of \$2.1 million per year over a  
2 approximately a 48-year period?

3 A Correct.

4 Q And your saying that's one of the numbers you  
5 considered?

6 A No, that number all the way over to the right.

7 Q The discounted totals, is that where you're looking?

8 A Yes.

9 Q And if you add that column, the discounted total  
10 column, up that's where they came up with the present day  
11 value of the \$16 million, isn't that right?

12 A Through, yeah into 2006.

13 Q Yes. And I guess again I'm asking, your coming back  
14 with the fact that you considered that number, what did you  
15 find, how did you view that number? Did you give it credit?

16 A No.

17 Q What do you find with regard to that number that is not  
18 credible?

19 A The testimony of Mr. Lawrence.

20 Q And again that was the testimony in response to the  
21 Amway attorney's questions; is that right?

22 A Correct. I would assume arbitration person -- someone  
23 conducting the arbitration.

24 Q With regards to the damages from the underlying suit,  
25 did you do any other independent investigation in a

1 spreadsheet of your own to try to quantify what the Debtor's  
2 damages were actually?

3 A No. I would -- let me say one thing. It's  
4 particularly the tax returns, I've been a CPA for 30 years,  
5 I have a lot of experience with small businesses and I have  
6 my, I say, my own opinion when I see cash flows from a  
7 business of this nature what the value would be.

8 Q Did you take any effort to put that into a numerical  
9 value before you walked into the mediation?

10 A Yes.

11 Q What value did you give it?

12 A Not a great deal.

13 Q And why not?

14 **MR. JONES:** Judge, I think when we get into  
15 analysis that goes directly to conversations that he had  
16 with his attorney, I'm going to assert attorney/client  
17 privilege, and ask him what did you, what was the number but  
18 how you got there, if the methodology came in meeting with  
19 his counsel, then I don't think that's a proper subject of  
20 inquiry.

21 **THE COURT:** Overruled.

22 **BY MR. BECK:**

23 A Repeat the question.

24 Q My question is distinctly is with in looking at those  
25 numbers, what value would you put on the business?

1 A I can't give you an exact number. But looking at the  
2 business with this type of cash flow even projecting it out  
3 ten years, taking a present value of it, it's not a large  
4 number. I believe it's, it would, you know, quite a bit  
5 less than the settlement amount.

6 Q And that would be an evaluation you would do if you  
7 were going to sell the business, isn't that right? You're  
8 trying to get a fair value for the sell of the business?

9 A Well you would -- I would assume you'd use it for that  
10 purpose.

11 Q Okay. But in this case, we're not actually selling the  
12 business, you're trying to settle a lawsuit because these  
13 Plaintiff's claim that the -- what the Defendants were doing  
14 to them caused them to have such a low cash flow or low  
15 profitability, when they expected to have more, isn't that  
16 right?

17 A Well, I really don't have personal knowledge of that,  
18 but even if you look at the numbers before, if you use the  
19 numbers before 1997, you still don't come up with a very big  
20 number.

21 Q Let me ask you this, then, what is your understanding  
22 as to what is being settled in the '05 lawsuit?

23 A The settlement, that was basically a breach of contract  
24 lawsuit.

25 Q And, I guess what I'm asking you as someone who is

1 going to accept this as an adequate settlement for that  
2 breach of contract, what were they claiming was the breach?

3 A That the Defendant was changing the deal.

4 Q And that effected them how, in a monetary way, in a  
5 status way, I just want to know that your understanding is  
6 trying to settle this claim as to what were you looking at?

7 A That they were, this was settling the lawsuit, but I  
8 think we're talking about the '98 lawsuit?

9 Q Yes.

10 A Okay. I think we said '05, but I think we met '98?

11 Q Yes, correct, thank you.

12 A That was a breach of contract and it was the Defendants  
13 had changed, they were changing the agreement and they were  
14 also instituting the arbitration provision.

15 Q Let me ask you this: As a -- and I looking at  
16 Exhibit 2, I think Counsel had brought up, if you looking  
17 down at the estimated number of assets -- with regard to the  
18 status at the time it was filed, and the information you  
19 took at the creditors meeting, do you think that it was a  
20 mistake on what was marked as the estimated assets based on  
21 the status at that point of a judgment against them, no  
22 money coming in from the business and although there was an  
23 appeal on file, there was actually no ruling from the court  
24 at that point?

25 A I don't know what they were thinking. This petition

1 was filed on the 14th, I don't think the schedules were  
2 filed until the 31st of that month.

3 Q I understand. And the only reason I ask is your  
4 counsel pointed to that box trying to say there's some  
5 credibility argument with regard to the Debtors based on the  
6 fact that now they're here claiming they had \$16 million  
7 worth of a business that was, and I'm asking you did you  
8 feel on the day that this was filed or at the time of the  
9 creditors meeting that there was anything wrong with the way  
10 they have filled this out based on the situation at the  
11 time?

12 A I can't recall five years ago, but when I'm reviewing a  
13 petition, I am very concerned if certain Schedules, amounts  
14 on Schedules, amounts on Statement of Financial Affairs, do  
15 not correlate and in regard to their tax return, the Debtors  
16 tax returns.

17 Q Do you recall from this case, you came across any of  
18 those issues or problems?

19 A I can't remember back five years ago at that time.

20 Q And you certainly not making that claim today are you?

21 A That there -- could you repeat that?

22 Q You're certainly not making the claim today that there  
23 was anything wrong with the way they had scheduled their  
24 assets or filed their paperwork today, are you?

25 A On these issues that we've talked about, no.

1 Q With regard to the total value of the settlement  
2 amount, how was the amount of \$2.8 million, \$2,868,000  
3 arrived at?

4 A It was negotiated.

5 Q And how did you arrive at the \$426,000, I understand  
6 that Mr. Akers gave you the weighting, what was that system?

7 A He gave us a list of the different Plaintiffs and the  
8 value of the cases, the value that he had assigned to each  
9 case that was totaled, the proper percentage was applied to  
10 each case and then that percentage was applied to the gross  
11 settlement.

12 Q Do you know where he came up with those numbers?

13 A No, I relied on him for that information.

14 Q So with regard to the weighting and the amount of money  
15 of the \$426,000 that is going to the Debtors in this case or  
16 to their estate -- I apologize, to their estate, you didn't  
17 do any independent investigation as to the weight of that,  
18 whether it should be less, whether it should be more of  
19 whatever the value was, in this case of the \$2.8 million.

20 A That was Mr. Akers' job.

21 Q In essence as the Trustee for the Debtor though isn't  
22 it your responsibility to make sure that number is correct?

23 A I relied on counsel's advice.

24 Q Did he give you any basis as to where the number came  
25 from? Or did he just say here's my list of percentages,



1 good luck?

2 A From his working on the case for 12-1/2 to 13 years was  
3 the basis of his values.

4 Q I understand the premise behind it, but I guess what  
5 I'm asking did he give you any direct evidence of it? Or  
6 did he just say because I've been working on the case for  
7 thirteen, I think this is the weight?

8 A Correct.

9 Q Now, I believe you testified earlier that there's 13  
10 cases that need to approve this Settlement Agreement; is  
11 that correct?

12 A Correct.

13 Q Within three different districts. Eight of them have  
14 been approved already; is that correct?

15 A Correct.

16 Q Do you know how many objections were filed?

17 A To my knowledge, two.

18 Q So of the eight that were approved, there was no  
19 objection filed, was there?

20 A Not to my knowledge.

21 Q And you're not the Trustee in any of those cases, other  
22 eight cases. Well I guess you are the Trustee for the *Kitia*  
23 case; is that correct?

24 A Correct.

25 Q And that one was approved but there was no objection

1 filed.

2 A Correct.

3 Q Is it your understanding that the settlement must be  
4 approved in all 13 cases?

5 A Yes.

6 Q When you were attending mediation, did you have  
7 Exhibit 2 and I'm looking again at Counsel's Exhibits 2, 3,  
8 4 or 5 with you?

9 A Two, three, four and five?

10 Q Yes, sir.

11 A I believe so.

12 **THE COURT:** Sir, you're looking in the book. He's  
13 talking about Mr. Councill's, not your Counsel.

14 **MR. BECK:** No, no, I'm sorry, I was actually  
15 referring to counsel he was correct, Judge. Looking at 2,  
16 3, 4, and 5, the bankruptcy exhibits.

17 **THE COURT:** The Trustees 2, 3, 4 and 5.

18 **MR. BECK:** Trustees 2, 3, 4 and 5.

19 **THE COURT:** Okay good, thank you.

20 **THE WITNESS:** Yes. I believe I did.

21 **BY MR. BECK:**

22 Q And did you pull those out and take a look at them in  
23 deciding whether to accept the \$2.8 million?

24 A Well, one, they were on my laptop, I looked at them  
25 electronically and two, I had reviewed this information

1 quite often in this year before the mediation and I was  
2 familiar with it.

3 Q Is there anything specific you could point to in any of  
4 those documents that you -- anything specific you considered  
5 in saying this is a fair, adequate and reasonable  
6 settlement?

7 A Exhibits 2, 3 and 4?

8 Q Yes, sir, and 5.

9 A No.

10 Q And the reason I ask is because counsel asked you many  
11 questions about what you considered and what didn't  
12 considered a lot of time was spent on these documents. You  
13 don't remember considering anything specifically about them,  
14 just in general you considered the documents in arriving  
15 that this is a fair and reasonable settlement?

16 **MR. JONES:** Judge, I'm assuming other than what he  
17 previously testified to?

18 **THE COURT:** Overruled.

19 **THE WITNESS:** Yeah, I considered all those things.

20 **BY MR. BECK:**

21 Q And with regard to Mr. Lawrence's evaluation, do you  
22 have any reason to believe that Mr. Councill and  
23 Mrs. Councill would not have gone diamond with Amway?

24 A I have no idea.

25 Q Did you investigate how close they were to reaching or

1 obtaining a diamond level?

2 A No.

3 Q I guess I'm going to test your understanding of the  
4 Amway business a bit here, but do you feel that if they were  
5 at a diamond level today, their income would higher than  
6 what you've seen from the Amway business?

7 **MR. JONES:** Judge, objection; lack of foundation,  
8 calls for speculation.

9 **THE COURT:** Overruled.

10 **THE WITNESS:** I have no idea.

11 **BY MR. BECK:**

12 Q In evaluating the value of the settlement of the  
13 arbitration suit, wouldn't that be something you'd need to  
14 know or need to look at as far as their damages from the  
15 breach of contract?

16 A Again, that was -- had been -- I had discussed that  
17 with counsel and the focus was put on the attorney's fees  
18 number.

19 Q Did you do any independent investigation on your own as  
20 to what an Amway business was, the extent of what amount of  
21 money could be made, anything like that, is it willable, is  
22 it lifetime, transferable to your children, did you  
23 investigate any of those issues?

24 A I've learned about it from this case.

25 Q And yet, I believe your testimony is when you were at

1 the mediation came to this settlement those weren't really  
2 things that you considered. You went more along with what  
3 counsel was telling you about his attorneys' fees and that  
4 kind of thing?

5 A On the adversary?

6 Q I'm focusing on now on the breach of contract.

7 A On the underlying case. No, no, I wasn't that wasn't  
8 the attorneys' fees on the underlying case it was discounted  
9 cash flow.

10 Q And I guess that's what I'm asking. Did you consider  
11 the diamond level or did you consider if they would made  
12 what they thought they should be, what their damage would  
13 have been?

14 A No.

15 Q You just considered what their cash flow was from 1997  
16 through what date?

17 A Of '90 to 2001.

18 Q '90 to 2001, and especially in Mr. Councill's case, he  
19 wasn't actively pursuing the Amway business anymore after  
20 that 1997/1998 time; isn't that right?

21 A Correct.

22 Q And yet it was still producing at least those numbers  
23 that you can verify off Exhibit 11?

24 A I took that into consideration.

25 Q Have you seen any evidence that the information

1 provided to Mr. Lawrence and his damage model was  
2 inaccurate?

3 A I just saw his responses.

4 Q And I believe from what we read into the record what he  
5 said is he didn't do anything to verify the numbers. But  
6 have you seen anything specifically that would say the  
7 numbers were inaccurate?

8 A No.

9 Q And again, you didn't call Mr. Lawrence to find out or  
10 to look at what he looked at did you?

11 A No.

12 Q Have you ever seen what Mr. Lawrence looked at in  
13 coming up with his compilation of \$16 million in this case?

14 A The testimony said that he gave the parties a  
15 questionnaire to fill out and he took the numbers off of  
16 their questionnaire and plugged into his calculations.

17 Q Understood. And I'm asking did you did you ever take a  
18 look at that information at least for the Council's?

19 A No.

20 Q Do you have any reason to dispute that that information  
21 was accurate?

22 A No.

23 (Pause)

24 BY MR. BECK:

25 Q I understand and know that you testified you've

1 considered a lot of things, can you identify for the court  
2 what was, if there is one, what was the most convincing  
3 feature/aspect/document that you looked at in deciding that  
4 \$426,000 about was reasonable and adequate for the  
5 settlement of the Councill's claims? Of the Debtor's claim?

6 **MR. JONES:** How about the estate's claims?

7 **BY MR. BECK:**

8 Q The estate's claims?

9 A There wasn't one specific thing it was a body of work  
10 so to speak that went into my conclusion.

11 Q Is it fair to say that a majority of that body of work  
12 came from Mr. Akers? Or from Amway?

13 A It's kind of hard to quantify. From the Debtors, from  
14 the general counsel that I first had, Waldron & Schneider,  
15 from Mr. Jones, from Brock Akers, those are the only people  
16 that were involved in the case with me, so yes. It would  
17 probably be a fair statement in some form or fashion.

18 **MR. BECK:** I have no further questions, Your  
19 Honor.

20 **THE COURT:** Thank you. Anything, Mr. Jones?

21 **MR. JONES:** No, Your Honor.

22 **THE COURT:** Anything, Mr. Sparacino?

23 **MR. SPARACINO:** No.

24 **THE COURT:** All right you can step down, sir.

25 **(Witness steps down.)**

1           **THE COURT:** Mr. Jones?

2           **MR. JONES:** Judge, that would conclude the  
3 Trustee's presentation.

4           **THE COURT:** Mr. Sparacino?

5           **MR. SPARACINO:** Your Honor, I have no witnesses.

6           **THE COURT:** Thank you. All right, Mr. Beck?

7           **MR. BECK:** If I could have just one minute to talk  
8 to my client, Your Honor, I may call him.

9           **(Pause)**

10           **MR. JONES:** Judge, if they need five minutes to  
11 talk, I've been going since really early, I would love a  
12 restroom break.

13           **THE COURT:** Let's come back at 20 till 5:00.

14           **MR. JONES:** Thank you, Judge.

15           **THE COURT:** I had announced before you arrived  
16 that I have got to be at a bar meeting tonight at 6:00, so  
17 I'm leaving here at 10 till 6:00, finished or not.

18           **MR. JONES:** How about 25 till, unless you are  
19 going to say we're done.

20           **MR. BECK:** I'm not going to call Mr. Council, so  
21 we have no other witnesses. Mr. West was my only other  
22 witness that I had here, that was on my witness list.

23           **THE COURT:** Well then we'll take a break until 20  
24 till 5:00, and I'll come back and we'll give you a decision.

25           **MR. JONES:** Thank you, Judge.



1           **THE CLERK:** All rise.

2           **(Recess take from 4:27 p.m. to 4:39 p.m.)**

3           **THE COURT:** Please be seated.

4                   All right. What I have before me is a Motion  
5 to Approve a Compromise filed by Mr. West, who is the  
6 Chapter 7 Trustee in this case. And I have an objection  
7 that is filed by the Debtor, Mr. and Mrs. Council.

8                   Let me say that, first of all, I'm going to  
9 end up approving the compromise. I don't see any point in  
10 keeping that under wraps. I think the law is really clear  
11 that I must do that. Nevertheless, I find this to be a  
12 difficult decision because I am, from a court of equities  
13 point of view, extremely sympathetic to Mr. Council and the  
14 plight in which he found himself.

15                   So although this is a difficult decision  
16 because of those equitable views, the law requires me  
17 objectively to review the Trustee's action and there is no  
18 question but that the Trustees proposed compromise must be  
19 approved under Supreme Court authority.

20                   The proposed compromise will provide a  
21 100 percent distribution to all of the creditors of the  
22 estate and some amount of money, as well, back to the  
23 Debtors. In determining whether to approve the proposed  
24 compromise, I'm required to consider whether the proposed  
25 compromise is fair and equitable. Meaning that the senior

1 interest are entitled to full priority over junior interest  
2 in this case that occurs. And that the settlement is  
3 reasonable in relation to the likely rewards of the  
4 litigation.

5           The four factors to consider under that are,  
6 one, the probability of ultimate success should the claim be  
7 litigated. In this case, I've got two separate and in my  
8 view independent claims to be litigated. The first that I  
9 will describe is the adversary proceeding having to do with  
10 the alleged wrongful conduct by Amway and the conduct of the  
11 arbitration provision.

12           In that case, I don't believe that there's  
13 much question in my mind, because I'm taking into account  
14 not just the testimony today but my entire knowledge of  
15 this, which has been pretty extensive through the case, that  
16 Amway will be found liable for its conduct subject to a  
17 defensive issue, which I'll get to in a minute. But that  
18 the damages from Amway's conduct will be extremely difficult  
19 to demonstrate.

20           Those damages are too difficult to  
21 demonstrate because their difficult to quantify and because  
22 the Debtors may have ended up filing bankruptcy at a stage  
23 when the actual consequences of the bankruptcy filing while  
24 not themselves be actionable. And a lot of the damages stem  
25 out of that actual bankruptcy filing.

1                   One of the things that we did early on in  
2 that case was issue an opinion, denying Amway's Motion to  
3 Dismiss under the Noerr-Pennington Doctrine. I really do  
4 take that into consideration pretty heavily in my  
5 determination today as to what will ultimately happen in  
6 terms of liability, not because I don't think their liable,  
7 but because I think that defense is something that has to be  
8 considered.

9                   I have a ruled the defense, but I think you  
10 have to -- I have to sit here and say what's the probability  
11 that I'm ultimately going to get overruled on that  
12 overruling of the defense? And when you make one of those  
13 decisions, you have to decide, you know, is that a decision  
14 that was an obvious call by the court or was that a more  
15 nuisance decision. That was really difficult decision. And  
16 I don't think I've reach any decision where I don't think  
17 the probabilities are greater than 50/50 that it will be  
18 upheld on appeal, but that one is right at the margin of  
19 saying I had a difficult call and there is a very  
20 substantial possibility that that gets reversed on appeal.

21                   I don't know what the percentages are, but  
22 greater than 35 percent and maybe, you know, right up around  
23 45 percent that my Noerr-Pennington decision gets reversed.  
24 It was a hard decision. If that gets reversed, that lawsuit  
25 is worth zero.

1                   So although I think that what Amway did was  
2 wrong and I know they haven't been able to fully defend  
3 themselves, but I read a lot and I think what they did was  
4 wrong. They may have a defense under Noerr-Pennington that  
5 I'm wrong about and the damages from attorney's fees are  
6 essentially zero, it was a contingency fee case, which puts  
7 us really into the intangible damages that were inflicted on  
8 the Councils, which are extraordinarily difficult to proof  
9 and which may fall as much out of the filing of bankruptcy  
10 as out of the arbitration. And I don't really have any  
11 amount in the record as to what those are worth.

12                   With respect to the main underlying case, and  
13 the probability of ultimate success, that is the '98 case,  
14 which will eventually go to trial, I found that the  
15 Trustee's business judgment as to the value of that  
16 litigation was plainly within the range of reason. And  
17 there were two things he testified to that I found somewhat  
18 overwhelming. One was that his evaluation of the damages  
19 model was that it was practically worthless. That  
20 evaluation was challenged by Mr. Beck appropriately when he  
21 said, "You know, look, you can't just say that, tell me what  
22 you base it on," and we then went through line by line a  
23 cross-examination of that expert witness.

24                   It was a devastating cross-examination. I  
25 don't think anyone could have sat through listening to that

1 and not decided it was a really bad cross-examination. And  
2 the Plaintiffs are going to be stuck with that. I don't  
3 care whether they hire a new expert or whatever they do,  
4 they're going to be stuck with that.

5 And you can credit it to the fact perhaps  
6 that Amway had good lawyers or you can credit it to the fact  
7 that the expert was bad and it really doesn't matter. It  
8 was a devastating cross-examination.

9 And so for Mr. West to conclude that he  
10 couldn't rely on that expert report given the cross-  
11 examination is something that can't be seriously be  
12 challenged.

13 Second, Mr. West, in applying the Amway  
14 damages model and comparing it to the tax return, I found  
15 that interesting, but I think Mr. Beck's point is pretty  
16 right that that's going to have its own biases built in.  
17 Then went off on a bit of a tangent which came into the  
18 record, which is I've been a CPA for 30 years, I've seen  
19 businesses of this size and I have to use my judgment as to  
20 what's a credible damages model. And his own personal  
21 judgment I gave quite a bit of weight to that he just didn't  
22 think it was credible to have the bigger model and he found  
23 the smaller model -- forgetting whether it came from a bias  
24 source or not, much more consistent with what his own belief  
25 was. And then looking at the data that comes in on an

1 unchallenged basis, I have to agree with Mr. West that the  
2 damages are probably less than the amount of the settlement.

3           Number Two, is the complexity expense in likely  
4 duration of litigating the claim. I'm going to mix into  
5 this the allocation. This is one of the more complex claims  
6 I've seen. It is difficult to deal with all of the  
7 intricacies of the Amway system. We have two different  
8 lawsuits. We have two different courts that are going to  
9 try those lawsuits. The original claim was filed 12 years  
10 ago. It's going to go on a lot longer, too. This isn't  
11 going to be resolved at a trial level. This will get fought  
12 tooth and nail until it goes all the way up back to the  
13 Fifth Circuit. There's a lot left in the case. It's gone  
14 on a long time. And I believe will be very complex, very  
15 expensive and very lengthy.

16           Part of the complexity deals with the fact  
17 that we have multiple Plaintiffs, each of whose damages will  
18 need to be independently evaluated. So this is sort of a  
19 mixture of one and two and that is how do we allocate the  
20 \$2.8 million amongst the various Debtors?

21           I thought what Mr. West did was right. And I  
22 understand the challenge to it, which is, you know, why are  
23 you just relying on Mr. Akers, but I think the answer to  
24 that is right, too. He's the one that actually knows the  
25 most about this in the whole world. He's worked on it for

1 13 years. He had no incentive to push numbers towards one  
2 Plaintiff versus another Plaintiff. He shouldn't personally  
3 care about that. He's the Trustee's lawyer. The Trustee  
4 asked him for an honest evaluation, he gets one.

5 I don't think the Trustee in the context of a  
6 9019, which is intended to determine whether a settlement is  
7 reasonable, needs to now say, "Well, you know, Mr. Akers,  
8 let me go into each case individually and let me create  
9 separate damages models." I think he does have the right  
10 and maybe the duty to rely on such an analysis by Mr. Akers.  
11 So I think all that was reasonable.

12 Number three is the difficulties of  
13 collecting a judgment rendered from the litigation. I don't  
14 think the Trustee even relies on this. There's no evidence  
15 of that. I find that this favors the settlement because I  
16 think Amway would pay, if as in when a judgment were  
17 ultimately rendered.

18 And finally, all other factors relevant to a  
19 full and fair assessment of the wisdom of the compromise:  
20 What I'm considering under this factor is not only the  
21 overall breath of knowledge I have in this case, and frankly  
22 -- I know this is going to be difficult for Mr. Councill  
23 since I am ruling against him today -- I know I'm  
24 sympathetic to Mr. Councill. I know I feel like he got  
25 wronged here and so as I view this compromise, I'm viewing

1 it with a bias in his favor because that's just where I am.

2 And I do take that into consideration in  
3 terms if I am so how saying I want to get this over  
4 prematurely or doing anything like that? But I know my own  
5 feelings about it and my own sympathies and I suspect this  
6 is hard for Mr. Councill to believe where I am, but that is  
7 where I am. And I do take that into consideration.

8 Second thing is, I saw substantial complaints  
9 by Mr. Councill about the quality of Mr. Akers' work. That  
10 plays a role in my decision and I want to explain why.  
11 First, to the extent that Mr. Akers did bad work, and I'll  
12 just assume that for the purposes of these findings. Number  
13 one that did not get scheduled any claim against Mr. Akers  
14 for pre-petition bad work. That is ambiguously gone under  
15 existing Fifth Circuit law. So if Mr. Akers did a bad job,  
16 there's no claim left against Mr. Akers if it arose prior to  
17 the date of the petition.

18 Second, if Mr. Akers did a bad job, the  
19 Trustee is stuck with that bad job. That actually favors,  
20 doesn't disfavor the compromise. If he missed deadlines, if  
21 he didn't do what he was suppose to do, if he blew the  
22 litigation in some stage. If he filed it too late, all of  
23 the different allegations that are in Mr. Councill's letter,  
24 the Trustee takes his case as he finds it. And he finds it  
25 with that alleged bad lawyering by Mr. Akers.



1                   If the allegation -- and most of the  
2 allegations that I saw pertained to allegations that  
3 Mr. Akers did a bad job prior to the time that the  
4 bankruptcy was filed. I'm not finding he did a bad job. I  
5 am just assuming that based on the allegations, but think it  
6 favors the settlement.

7                   To the extent that Mr. Akers did a bad job  
8 after he was retained by Mr. West, we're not reaching that  
9 determination. If he did a bad job after he was retained by  
10 Mr. West, it does favor the settlement because Mr. West  
11 needs to take less to recognize that. It also means the  
12 ultimate result to Mr. Councilll will ultimately greater if  
13 we do determine that Mr. Akers did a bad job after the case  
14 was file.

15                  Again, we are not in a position to and will  
16 be considering whether he did a good job before he was  
17 retained by Mr. West. But we certainly couldn't have  
18 anticipated and I've seen no evidence at this stage that  
19 Mr. Akers did a bad job after Mr. West retained him. But if  
20 he did, that'll go into his fees, if his fees are less,  
21 Mr. Councilll gets paid more, so I'm not foreclosing that in  
22 anyway.

23                  Taken as a whole, settling this claim for  
24 this amount of money is well within the range of discretion  
25 in the business judgment that the Trustee has, I have no

1 hesitancy that the right legal call is to approve the  
2 compromise.

3                   At the beginning of today's hearing I  
4 indicated that the Order would make clear that none of  
5 Mr. Council's post-petition claims are settled by this. I  
6 am going to require an Amended Order to be submitted by the  
7 Trustee that is consistent with that. If Amway doesn't  
8 agree to settle on that basis, then they don't agree and  
9 there won't be a settlement.

10                   I can't force Amway to settle. But I'm not  
11 going to force Mr. Council to settle either. I can't do  
12 that either. So to the extent that he has claims that arose  
13 post-petition, the Order should include a provision that  
14 either Amway or Mr. Council can come to me to get a  
15 determination of whether a claim arose pre- or  
16 post-petition.

17                   I don't want to put anybody in a position --  
18 I don't want to put Amway in a position where they don't get  
19 the benefit of the bargain. I don't want to put  
20 Mr. Council in the position where he has to go file the  
21 claim then perhaps be held in contempt of court. Neither of  
22 those is fair so I'm going to retain jurisdiction to  
23 determine whether claims have been released or not and to  
24 determine whether they are pre- or post-.

25                   Hopefully you-all can do that in some sort of an

1 agreed motion for a determination rather than a lawsuit.  
2 You can put that in the Order, but I will reach that  
3 determination if, as, and when I need to.

4 **MR. JONES:** And Judge, just now I'd like to get  
5 Mr. Beck's input is what I'm hearing you say, and I want to  
6 make sure we're all on the same page is that prior to any  
7 claim being asserted, a motion will be filed, or was it  
8 after the fact?

9 **THE COURT:** I think Mr. Councill would be foolish  
10 to do it any other way so that's why I want to give him the  
11 option to do that.

12 **MR. JONES:** Okay.

13 **THE COURT:** I'm enjoining him from bringing the  
14 estate claims. But if he has a claim that he's 100 percent  
15 sure is his and not an estate claim and he brings it at the  
16 risk of being held in contempt, I can't enjoin him and I  
17 won't enjoin him for bringing his own claims. I'm just  
18 telling him and your probably better off not being in  
19 contempt of court.

20 **MR. JONES:** I understand, Judge.

21 **THE COURT:** I'm just giving him that option, yeah,  
22 so -- but I don't think I have the authority to enjoin him  
23 from bringing his own claims.

24 Under 105, just to make the record really  
25 complete, I have done that before, when I see a Debtor that

1 frivolously brings claims repeatedly that are actually  
2 claims of the estate and I'll say, "No, you're violating our  
3 Order. As a punishment for contempt, you now need to come  
4 back here to get advance approval."

5 I got no indication that that's who I got  
6 here. No indication that Mr. Council will do anything  
7 wrong and I'm not going to enjoin him from doing something  
8 that's right to stop him from doing something that's wrong.

9 But I'm going to give him the freedom to come  
10 and do that if that's what he chooses to do. And I hope  
11 that he and Mr. Beck will talk a long time about what is and  
12 what isn't pre- and post-. And perhaps talk to  
13 Mr. Sparacino, as well, and find a way to put an end to  
14 this. But if he has a claim, he has a claim.

15 Mr. Jones, can you get that submitted in the  
16 next 14 days?

17 **MR. JONES:** Can I look to someone?

18 **THE COURT:** No, I don't even need them to agree.  
19 They don't have to agree.

20 **MR. JONES:** I'm sorry, Your Honor.

21 **THE COURT:** Mr. Sparacino, doesn't need to agree.  
22 He doesn't sign the deal, he doesn't sign it.

23 **MR. JONES:** Well Judge, I agree that that's a  
24 statement of fact. It also, I think, is part of my job  
25 given -- I negotiated with 13 different lawyers and I want

1 to circulate that Order.

2           **THE COURT:** No, they don't get a say in the Order.  
3 It's my Order. I want you doing what I've told you to do.  
4 If you don't want to do it, I'll write it on my own.

5           **MR. JONES:** No, Judge, I'll do it.

6           **THE COURT:** It doesn't need to get circulated to  
7 anybody. You've do what I've told you to do.

8           **MR. JONES:** Fourteen days will be great.

9           **THE COURT:** Thank you. We're in adjournment.

10           **THE CLERK:** All rise.

11           (Proceeding adjourned at 4:57 p.m.)

12

13 *I certify that the foregoing is a correct transcript from*  
14 *the electronic sound recording of the proceedings in the*  
15 *above-entitled matter.*

16 */s lmartin*

17

18 **JUDICIAL TRANSCRIBERS OF TEXAS, INC.**

19 **JTT JOB/INVOICE # 28609**

20 **DATE: OCTOBER 20, 2010**

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